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REPORTS

CASES AT LAW AND IN CHANCERY

ARGUED AND DETERMINED IN THE

SUPREME COURT OF ILLINOIS.

VOLUME 253.

CONTAINING CASES IN WHICH OPINIONS WERE FILED IN FEBRUARY,
1912, AND CASES WHEREIN REHEARINGS WERE DENIED AT
THE FEBRUARY AND APRIL TERMS, 1912.

SAMUEL PASHLEY IRWIN,
REPORTER OF DECISIONS.

BLOOMINGTON, ILL.
1912.

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JUSTICES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

ORRIN N. CARTER, CHIEF JUSTICE.

JAMES H. CARTWRIGHT,	}	JUSTICES.
JOHN P. HAND,		
WILLIAM M. FARMER,		
ALONZO K. VICKERS,		
FRANK K. DUNN,		
GEORGE A. COOKE,		

ATTORNEY GENERAL,
WILLIAM H. STEAD.

REPORTER OF DECISIONS,
SAMUEL PASHLEY IRWIN.

CLERK,
J. McCAN DAVIS.

AMENDMENT OF RULES 13 AND 39.

On April 15, 1912, the following proviso was added to rule 13 of the Supreme Court, relating to the removal of records from the office of the clerk:

"And provided further, that where the original bill of exceptions or certificate of evidence shall be incorporated in the transcript of the record and the judgment or decree shall be reversed and the cause remanded for another trial or hearing, said original bill of exceptions or certificate of evidence may be withdrawn by either party desiring to use the same on another trial or hearing, and the clerk of this court, upon application therefor, will detach the same from the transcript, substituting therefor the receipt of the party to whom the same is delivered and a certified copy of any original document included in or annexed to such bill of exceptions or certificate of evidence as an exhibit."

On April 4, 1912, the following amendment to the second paragraph of rule 39 of the Supreme Court was adopted, relative to the times and places for holding examinations for admission to the bar:

"Examinations shall be conducted by written or printed interrogatories, in whole or in part, and be as nearly as possible uniform throughout the State; to be held at Ottawa on the last Tuesday in February; at Chicago the first Tuesday next succeeding the fourth day in July; at Springfield the first Tuesday in October, and at Mt. Vernon on the first Tuesday in December in each year. Such examinations shall be held by the examiners as a body, a majority of whom shall constitute a quorum."

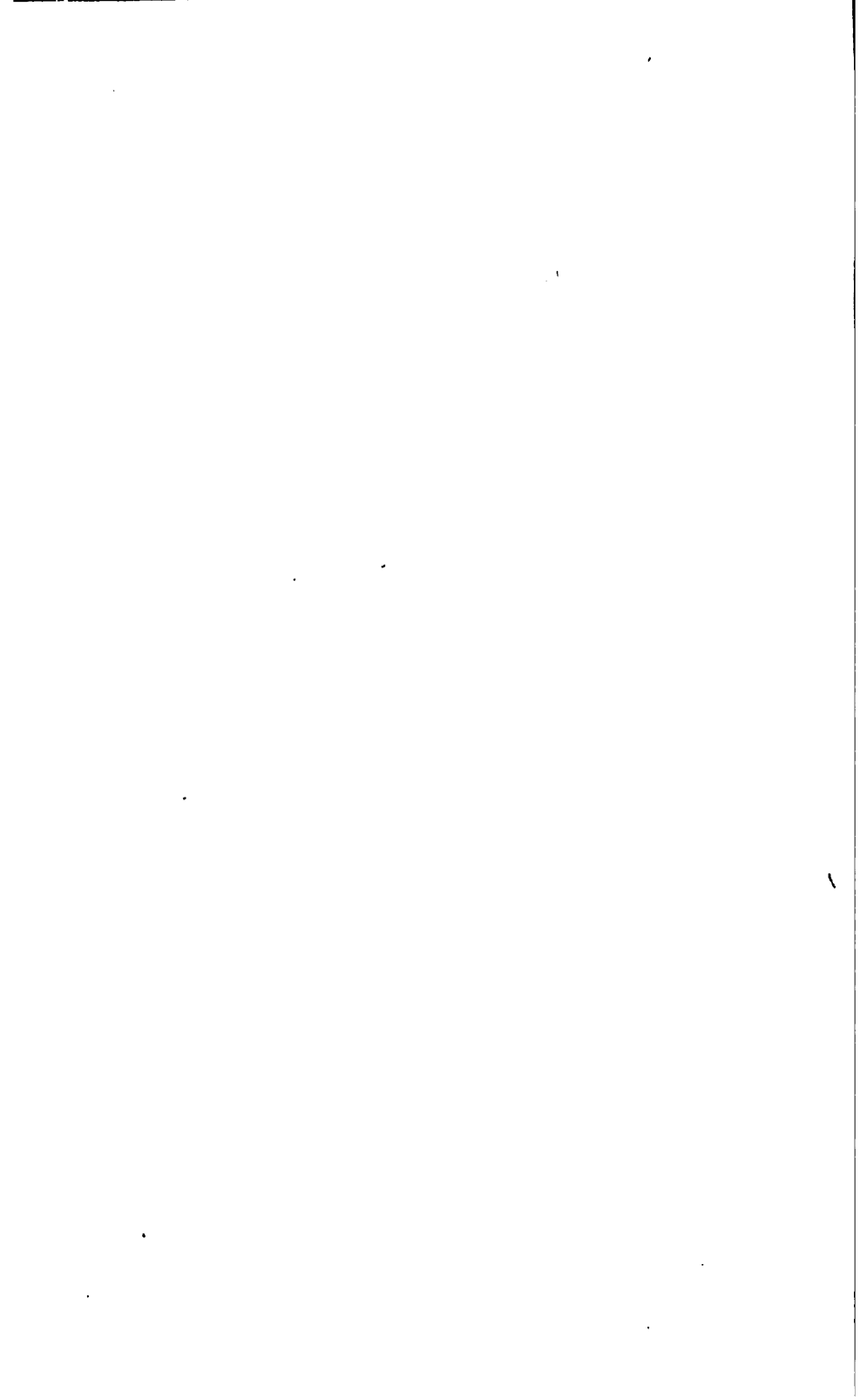
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MEMORIAL SERVICES

HELD IN THE SUPREME COURT OF ILLINOIS ON THE DEATH
OF THE HON. ALFRED M. CRAIG.

On Saturday, December 16, 1911, at two o'clock in the afternoon, which hour had been set apart for the purpose, the following proceedings were had:

MR. CHIEF JUSTICE CARTER:

This afternoon has been set apart for services in memory of the late Alfred M. Craig, for many years a member of this court. I understand a committee of the State Bar Association is here to present a memorial. The chairman of the committee, Mr. E. P. Williams, of Galesburg, who perhaps knew Judge Craig as long and as intimately as anyone now living, will present the memorial.

MR. WILLIAMS:

May it please the Court—Horace Kent Tenney, president of the Illinois State Bar Association, with the approbation of the executive committee, appointed Isaac N. Bassett, John S. Stevens, John P. Wilson, Albert D. Early and E. P. Williams a committee to prepare and present to this honorable court a suitable memorial upon the life, character and public services of Alfred M. Craig, late a member of this court. We beg to submit the following:

Alfred M. Craig was born January 15, 1831, in Paris, Edgar county, Illinois. He was of Scotch-Irish descent, his father being David Craig and his grandfather Thomas Craig, the latter coming from the north of Ireland. His mother's maiden name was Minta Ramsey, daughter of Sinot Ramsey, a Virginian, who came to Kentucky at an early day and was there associated with Daniel Boone, Kenton, and other noted fighters during the Indian

wars. David Craig, father of Judge Craig, was born in Philadelphia and emigrated to Lexington, Kentucky, at an early date and married there, but, like thousands of the middle class in the southern States who were not slave holders and did not depend on the institution of slavery, he moved away from Kentucky and came north to Illinois. After a short stay in Edgar county, where Judge Craig was born, his parents removed to the military tract and settled in Fulton county, Illinois. The family was a large one. The elder Craigs belonged essentially to the independent white people of the south who were not wedded to slavery, and, like others of their class having large families, were thoroughly industrious and came to the new country to help make it. The father settled on a farm five miles west of Canton. He was a millwright and built several mills along Spoon river. David Craig died at his home near Canton about 1860. Of the father's family, one sister, Mrs. Harriet Barnwell, of Los Angeles, California, survives.

Judge Craig grew to manhood on the farm. He received a good common school education, one of his first teachers being the late John M. Palmer. He later attended an academy in Canton and in the fall of 1848 entered Knox College, from which institution he was graduated in 1852. Immediately afterward he began the study of law in the office of the late William C. Goudy. Judge Craig was admitted to the bar in 1853, and the year following entered upon the practice of the law at Knoxville, as a member of the firm of Manning, Douglas & Craig. He rose rapidly in his profession, and in 1855, Mr. Goudy having resigned as State's attorney, Judge Craig was appointed his successor as State's attorney for the circuit, comprising the counties of Knox, Henry, Mercer, Warren, Henderson and Fulton.

As a practitioner Judge Craig made careful study of his cases with a view, first, to ascertain the facts; second, by whom provable. Not content to trust to hearsay for information at second hand, he insisted upon personally interviewing the witnesses before the trial, with a view accurately to ascertain just what facts were provable by each. At the trial of a cause at the circuit he did not talk down to, but to and with the jury, as man with man, neighbor with neighbor; never going behind the bush to mince matters; always self-reliant, self-assertive, self-poised, sagacious;

an accurate judge of men; possessed of great fixedness of purpose, strong and impressive personality; always prompt, tactful, indefatigable; adequate to every emergency; withal of plain and unassuming manners. He was at once on good terms with all his neighbors,—not simply the wealthy and powerful, but the humblest individual as well. As a public prosecutor he made an enviable record, meanwhile proving himself a lawyer of very considerable ability. He put on no airs, but it was soon evident that he was a factor to be reckoned with. Thoroughly grounded in the principles of the common law, especially familiar with statutory provisions and with the decisions of our own Supreme Court as well, he soon attained to a position in the very front rank of the bar of the circuit.

In August, 1857, Judge Craig was united in marriage with Miss Elizabeth P. Harvey, the beautiful and accomplished daughter of Curtis K. Harvey, deceased,—a lawyer of distinction, ability and high character and a member of the constitutional convention of 1847. To them, as fruits of this marriage, were born four children, of whom two, Dr. Harvey Craig and attorney Charles C. Craig, both of Galesburg, Illinois, survive. A daughter, Mrs. Carrie E. Bradford, departed this life in 1890, and a son, George Craig, died in February, 1896. Mrs. Elizabeth P. Craig died in August, 1904.

In 1859 Judge Craig was elected county judge, holding the office one term and discharging the duties of the office with promptness, fidelity and dispatch. In 1869 he was elected a member of the constitutional convention which framed the present constitution of Illinois. His colleague and room-mate while attending the sessions of the convention was the late John Scholfield, long an honored member of this court. They were especially efficient co-workers in shaping the constitution on wise, liberal and judicious lines. Judge Craig's familiarity with county affairs rendered him especially qualified to deal with township and county matters. He was on the committee of electoral and representative reform, along with Joseph Medill, O. H. Browning, Milton Hay and others; likewise a member of the committee on railroad corporations and on the committee on legislative apportionment. It goes without saying that his course in the convention was especially satisfactory

to his constituency and established his reputation as a wise statesman of broad and liberal views.

In 1873 Judge Craig was confessedly in the very front rank of the bar of our circuit as a successful trial lawyer. At the judicial election in June, 1873, he was elected to the Supreme bench of this State. He took the oath of office and entered upon the discharge of his judicial duties at the June term, 1873. The first opinion filed by him is found in the 67th Illinois and the last in the 186th Illinois. During his twenty-seven years of active work on the Supreme bench he never missed a single term of court nor failed to do his full share of the work of the court. During all that time he was recognized by his colleagues as an able coadjutor. He took with him upon the bench his thorough, careful business methods and did much to apply such methods to the business of the court, bringing order out of what had been to some extent chaos, and reducing the methods in vogue in the court and the clerk's office to a thoroughly business basis.

At the June election, 1900, Judge Craig was a candidate to succeed himself but was defeated by John P. Hand, who was chosen his successor. He acquiesced in the people's choice, and quietly and unobtrusively devoted his attention thenceforward to his private business affairs, as a plain citizen of the commonwealth. During all of his years of service upon the Supreme bench, without neglecting in the least his duties as a judge, he looked after his own affairs wisely and efficiently, and so managed his private business as not only to accumulate an independent fortune, but to establish himself, in the meantime, deservedly, in the hearts of the common people of Knox and the adjoining counties. He was a pattern of prudence, reliable as a business man, and had and deserved the confidence of the people. His judgment was sound and the people had learned to trust him, hence, later, when he suggested the establishment of a State bank in Galesburg and several private banks in the neighboring communities, the people, relying upon his judgment, joined with him, and the enterprises, through his sound judgment and management, were eminently successful. He was for many years an honorable and efficient member of the executive committee of the board of trustees of his beloved *alma mater*. During that time he never missed an appointment and

never refused to accept his full share of responsibility for any and all action taken with reference to the college.

In July, 1908, Judge Craig was again married, his wife being Mary Davis, of Galesburg, a lady of estimable character, and the union proved to be a happy one. She still survives him.

It would be invidious to attempt any review of the important cases coming before the Supreme Court during the time of Judge Craig's incumbency in which he took an important part. However, the period was one of marvelous business development, in which the methods of business were changing, the interests increased in magnitude and the old time methods in business no longer applied. It became necessary to consider all these things in the application of judicial principles and the decision of cases before the court. They were times calling for the largest application of common sense and an attempted adaptation of the law to the new and changing conditions when it could be done without attempted judicial legislation. It may not be amiss to mention one or two cases in which Judge Craig took a prominent part and prepared the opinions.

In 1874 a question had arisen in this State over the right of school directors, in the management of the schools, to discriminate between white and colored children by providing separate schools for each class. The question was a new one, and it called for a broad, comprehensive view; looking to the law, to the rights of the people and the greatest good to the greatest number. The Supreme Court held that a board of school directors had large and discretionary powers in the management and control of schools, but that they had no power or right to make any class distinction between white and black, rich and poor, the children of one nationality or another, and that they had no right to discriminate between boys and girls on account of their color or any social position. There was one dissenting opinion,—Judge Walker of the Supreme Court,—but the majority opinion was in accord with the better public sentiment and with the broad principles of humanity and righteousness.

Another case might be mentioned of great importance to the people of the State, as subsequent events have since shown. It was a case involving the question of the rights of the Illinois Cen-

tral Railroad Company under the act incorporating such company, granting a strip of land two hundred feet wide for right of way, and providing that the company might take possession of any lands, streams and materials for depots, etc., and further providing that all land, water privileges and materials belonging to the State were granted to said corporation for railroad purposes. Under this claim the Illinois Central Railroad Company undertook to take possession of the partially submerged lands along the lake front, in Chicago, lying outside of its right of way. The court unanimously in that case (Judge Craig writing the opinion) held that the words of the statute were clear and unambiguous; that neither the letter nor the spirit of the act included lands covered by water; that the State held the lands lying within its boundaries covered by Lake Michigan in trust for the people, for the purposes of navigation and fisheries; that the State had no right or power to barter or sell the lands, but the title was held in trust for the benefit of the people, in their sovereign capacity, of the entire State of Illinois. It was a question of vast importance as subsequent events have shown, and it was settled on right principles, owing to the broad, comprehensive, as well as conservative, views of the court. That decision was upheld by the Supreme Court of the United States. It was in cases of that class that Judge Craig's ability was best shown. He was possessed of large common sense and took a broad view of all such questions whenever presented. He always looked for the good of the greatest number, and whenever not circumscribed by legal precedents, which it was hardly possible to depart from, he applied this large common sense in the interest of the whole people.

Another case of great importance, and which has been, during all the years since, in one form or another, almost constantly before the courts of all the States and of the Federal courts, was decided by the Supreme Court, Justice Craig delivering the opinion. It was a case involving the validity of certain sections of the Railroad act of 1874, designed to prevent unjust discrimination in the rates charged for transporting passengers and freight. The Supreme Court of this State held that the act was not to be limited to railroads organized under the laws of the State, but included all railroad companies operating any railroads within the

State, regardless of the place of their organization. That case went to the Supreme Court of the United States, and the decision of the Supreme Court of this State was reversed by the majority of the court. A vigorous dissenting opinion, however, was presented by Chief Justice Waite, and, strange to say, the decision of the case by our Supreme Court and the doctrine announced in the dissenting opinion have come to be very generally accepted as the correct doctrine to be applied in all cases of the kind.

Judge Craig's last public work was in connection with the State Tax Commission appointed by Governor Deneen. He accepted the appointment reluctantly, but in view of the high character of his associates on that commission and the importance of the work he decided to accept the appointment and serve as best he might. For such a position he was in every way eminently fitted. His acquaintance with business, with values, with the needs of the State, with the proper principles of taxation, made him a valuable member of such a commission, and it is to the credit of Governor Deneen that he selected such men for that duty.

As we have said, Judge Craig was a thorough-going business man. He never undertook any enterprise hastily or thoughtlessly, but carefully considered and clearly outlined in his mind the course to be pursued by him touching any business transactions or any legal or judicial work. When he had thought the matter out and made up his mind he followed the course with inflexible determination. He never indulged in speculation or gambling in any form. His investments in his earlier years were made in farm lands, with a view to the permanency of such investments. That he chose wisely for his investments has been fully demonstrated in these recent years, for he became the owner of large tracts of fertile lands in the corn belt of Illinois, which have made him a fortune by their increased value and productiveness.

Judge Craig, in his private life and in his donations and his charities, was never careless or thoughtless. He did not throw his money around to attract the attention of the public, but when appealed to in cases of necessity and want he rarely failed to respond generously and kindly. When his *alma mater* was sorely in need of funds and there was danger of suspension for the want thereof, Judge Craig generously and spontaneously contributed

\$10,000 to prevent any catastrophe to the institution, which had done so much for the community.

Judge Craig continued to manage his affairs with the same carefulness, clearness and sound judgment which had always characterized him, to within a few days of his death. He apparently lost little of his physical energy and retained to the end his mental vigor and vitality. About the first of September he contracted a slight cold but continued about his business as usual, deeming the attack of slight importance. It, however, increased in violence and developed pneumonia, from which he died in his home, in the presence of his wife and his sons and their families, on the sixth day of September, 1911. The funeral services, unlike many such, testified to the general esteem in which Judge Craig was held in the community where he lived. His neighbors and friends gathered together to pay their respects to his memory in the last sad rites. In the passing of such a man there is a loss to the community in which he lived and a loss to the people at large. He was deservedly held in high esteem by his neighbors and friends and by all with whom he came in contact in the discharge of the varied duties of his life.

I respectfully move the court that this memorial be spread upon the records of this court and published in the Illinois Reports.

Mr. CHIEF JUSTICE CARTER:

The death of Judge Craig brings forcibly to the minds of all the judges now on the bench, the fact that so few of the former members of this court are still with us. Only three survive. I knew Judge Craig but slightly. I met him a few times when I appeared before the Supreme Court to argue cases, though I knew him in a general way from the time I was admitted to the bar, he having signed my license, as he did those of most of the members of the present court. While I did not know him well, personally, no one can study his nearly 1500 opinions, found published in 120 volumes of the Illinois Reports, without becoming familiar with his intellectual qualifications. One who does this must realize and appreciate the sound legal judgment and the strong common sense that entered into his judicial work. He served longer than any other judge of the Supreme Court under the present

constitution, only three having served longer in the court's entire history. His opinions are found in a greater number of volumes of the Illinois Reports than those of any other judge who has served in this court. The senior justice is the only member of the present court who served with Judge Craig on the bench. It is therefore peculiarly appropriate that Mr. Justice Cartwright should respond for the court.

MR. JUSTICE CARTWRIGHT:

The judgment of the people in adopting a plan, which became a part of the constitution of this State in 1848, by which they have selected from their number those to whom they have been willing to commit the determination of questions concerning their most sacred rights of life, liberty and property, has been approved and justified by an experience of more than sixty years. The choice of judges has seldom, if at all, been influenced by party service, political standing or recommendations by politicians of those who have aided their ambitions. If in some exceptional case a party label has helped into judicial position a person who did not represent the deliberate choice of the people for the discharge of judicial duties, it is to be charged to legislation which has introduced the political element and required a party designation. Even under such legislation, which is contrary to the spirit and intent of the constitution, it has been proved that the people choose their judges on different grounds than in the case of other officials, and, seeking information as to fitness, are ready and willing to follow it as their only guide. The scheme of the framers of the constitution was to separate judicial elections from all others, and, as far as possible, to eliminate political and party considerations. How perfect the plan was and how complete its success when put in execution by an intelligent people is shown in the case of the judge to whose memory this hour is devoted. Three times Alfred M. Craig was the choice of the people of a district in which no person of his political faith could have been elected to any but a judicial office. When he was first elected, in 1873, there was a revolt of the people against economic conditions which were unjust and oppressive. They thought that relief had been secured through a legislative act, but, as sometimes happens, the act was

in conflict with the fundamental law which the people themselves had made and to which the legislature and the courts are alike subject. This court had declared the undoubted right of the legislature to prevent the wrong complained of, but found it impossible to execute the act until it had been amended. The people, not understanding the legal questions involved as fully as lawyers would, but determined to select someone on whose judgment they could implicitly rely and in whose decision they would have perfect faith, chose Judge Craig. Undoubtedly an injustice was done to a learned, upright and impartial judge, but in the state of the public mind the same result would have been inevitable under any system of choosing judges. Public opinion would have been resistless whether made effective by the ballot or through an appointing power. Although there was a social upheaval at the time, there was also controlling good sense and sound judgment, and the choice of the people fell upon one who justified his selection during a service of twenty-seven years and retained the public confidence to the end. If there was either hope or fear that he would be a partisan or represent a class, neither hope nor fear was ever realized.

In thought and act Judge Craig was conservative. He did not believe that wisdom had been born on yesterday and was ready at once to take the reins of government and the management of public affairs. If there was wrong and injustice he was ready to correct it and apply the remedy, but he realized that no system is entirely free from minor defects; and he did not believe in changing the existing order of things, under which peace and prosperity had been secured and the blessings of liberty enjoyed, merely for the purpose of trying new schemes. No one could have been chosen who would have been less representative of social unrest or dissatisfaction or less disposed to experiment with untested inventions of immature statesmen and advisers of the public, which are as likely to introduce new evils as to remedy old ones.

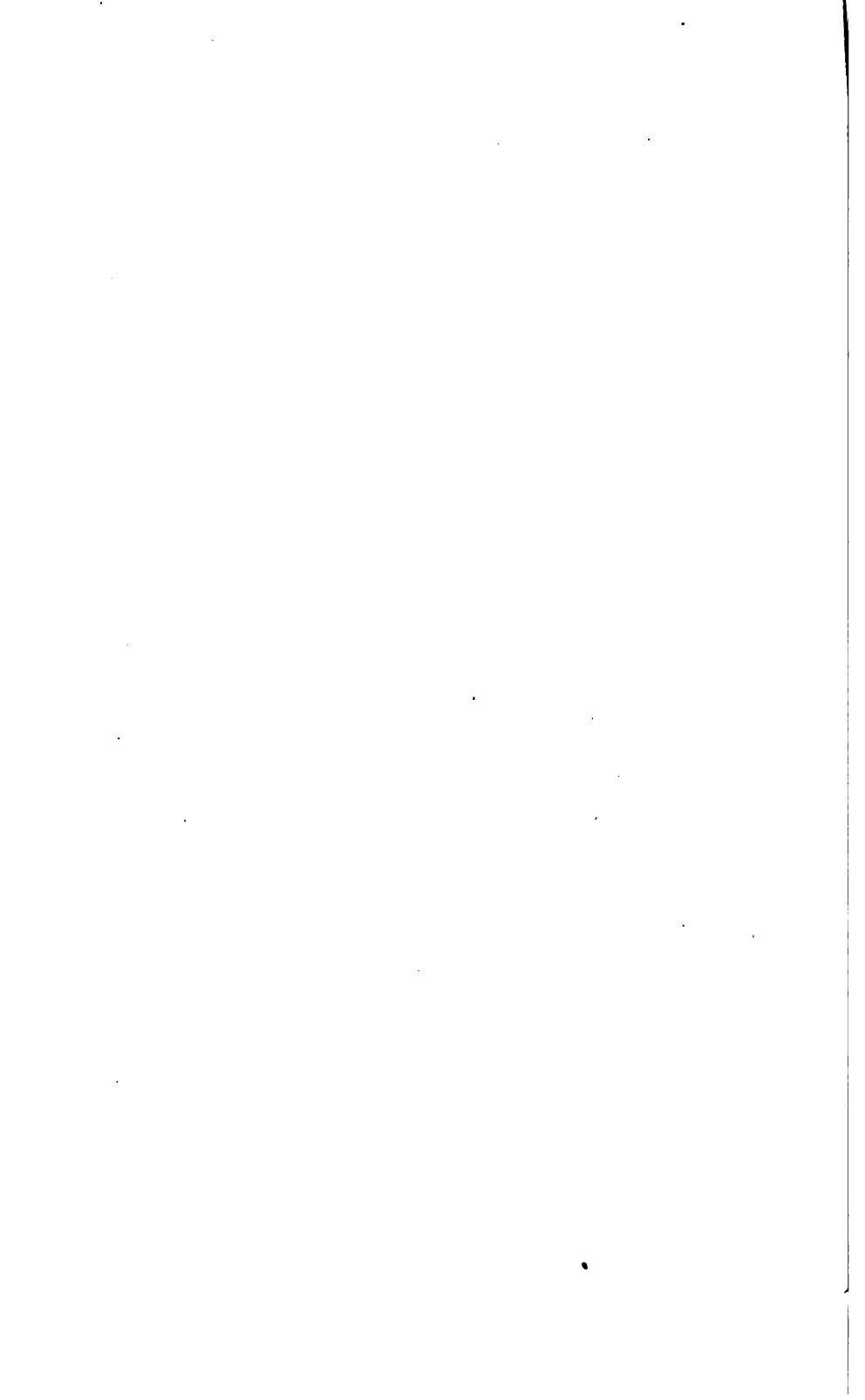
As a judge he took less interest in intricate legal questions than in accomplishing justice in the case in hand. He was not a student of the literature and learning of the law, but he never lost sight of the substantial rights of litigants, and his constant aim was to secure and protect such rights. In the conference room

he was not disposed to join in discussions of mere rules of law disconnected from the facts of the case, and was generally content to let his opinion speak for itself. He was a successful business man, and always had in mind the practical consequences of rules of law as applied to business and the relations of men to each other in business and social life.

My personal acquaintance with Judge Craig began upon my election, sixteen years ago, and we were intimately associated until the end of his term of service. When I came into the court he gave me good counsel, which was very helpful to one who was entering upon a new service. I learned, as other members of the court had done, to rely upon his judgment and discretion in matters connected with the court,—and that judgment was never at fault. He had great administrative ability and made an admirable presiding chief justice. He would have been a great commander or chief executive of a State. As a man and a judge, the characteristics in which he excelled were common sense, sound judgment and a broad and comprehensive view of business, social conditions and public affairs. In those respects he was not equaled by anyone with whom I, personally, have been acquainted. The events of his life have already been detailed in the memorial presented to the court and need not be further adverted to. His life and public service are well worthy of commemoration.

MR. CHIEF JUSTICE CARTER:

The memorial and response will be spread at large by the clerk upon the records of the court and the reporter will publish them in the bound volumes of our Reports. As a further mark of respect to the memory of Judge Craig the court will now stand adjourned.



CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF ILLINOIS.

THE MARIE METHODIST EPISCOPAL CHURCH *et al.* Appellees, *vs.* THE TRINITY METHODIST EPISCOPAL CHURCH *et al.* Appellants.

Opinion filed December 21, 1911—Rehearing denied Feb. 8, 1912.

1. RES JUDICATA—*rule of res judicata stated.* Where there is identity of parties and subject matter in two suits, the question which was at issue and judicially passed upon and determined in the first suit is conclusively settled by the judgment therein and cannot be again litigated in the second suit.

2. SAME—*complainant must present all the grounds for relief prayed, in first suit.* A complainant must present all the grounds showing his right to the relief prayed for which could have been presented, and if he fails to do so he cannot be allowed, in a second suit, to take advantage of such omission.

3. SAME—*matters open to consideration which could have been presented are settled.* All questions relating to the same subject matter which were open to consideration and which could have been settled in the first suit are conclusively settled, as between the parties, whether they were presented or not.

4. SAME—*a former judgment must be upon the merits, but it may be upon the facts admitted by demurrer.* A former judgment must have been upon the merits to operate as a bar to a subsequent suit; but it is immaterial whether the judgment was upon

the facts proved or upon the facts alleged which were admitted by demurrer, as the same legal consequences follow in either case.

5. SAME—*judgment on demurrer for defective pleading or because of mistaken remedy is not a bar.* A judgment on demurrer because of a defective pleading or because the remedy is at law and not in equity is not a bar to a subsequent suit in which the cause of action is well pleaded or which is in the proper forum; but where the parties choose to present issues of law on the merits by demurrer they are concluded by the judgment as much as though it were upon a hearing.

6. SAME—*what is not judgment for defective pleading.* Where a bill claims an equitable title in fee simple in certain premises and alleges the facts upon which such claim is based, the fact that the defendant admits the facts by demurrer instead of requiring the complainant to prove them does not render the judgment sustaining the demurrer and dismissing the bill a judgment because of a defective pleading.

7. TRUSTS—*Statute of Frauds requires writing to be signed by one who is "by law enabled to declare" the trust.* The provision of the Statute of Frauds concerning express trusts requires that the writing manifesting the trust be signed "by the party who is by law enabled to declare the trust;" and while the writing need not be framed for the express purpose of declaring the trust, it must be signed by a proper declarant, and show not only that there is a trust, but what it is.

8. SAME—*who may declare trust.* A trust may be declared by the person executing a will or deed by which land is devised or conveyed, and a grantee to whom land is conveyed may declare that he holds it in trust.

9. CHURCHES—*the power to adjudicate upon civil and property rights is vested in the civil courts.* The judicial power and the authority to adjudicate upon civil and property rights is vested in the courts and not in ecclesiastical tribunals, but the courts accept the decisions of the highest tribunals of churches upon questions of faith or doctrine, and where the ownership of property depends upon the decision of such a question the courts will follow the construction of the ecclesiastical body and adjudge the title to the property accordingly.

10. SAME—*when decision of ecclesiastical tribunal upon property rights is without force.* A decision of an ecclesiastical tribunal upon civil or property rights, which are not dependent upon the decision of any question of faith or doctrine, will not be accepted by the courts as controlling the correct determination of such rights.

APPEAL from the Circuit Court of Cook county; the Hon. JOHN GIBBONS, Judge, presiding.

HOLLAND & ELLIOTT, for appellants.

SETH F. CREWS, for appellees.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The appellee the Marie Methodist Episcopal Church of Chicago filed its bill in equity in the superior court of Cook county against the appellants, the Trinity Methodist Episcopal Church of Chicago and its trustees, praying the court to declare a trust in favor of said appellee in certain real estate in Chicago and to require the appellants to convey the same to it. The prayer for such relief was based on averments that the First Methodist Episcopal Church of Chicago contributed \$10,000 to the erection of the building on said real estate under an agreement that Harlow N. Higinbotham, who had purchased the lots, should convey the same to said First church within three years, and that said First church should hold said real estate until there should be a legally incorporated Methodist Episcopal church to take and hold the same, when the same should be conveyed by said First church to such church so incorporated. Appellants demurred to the bill, and the demurrer was sustained and the bill dismissed. From that decree said appellee appealed to this court, and the decree was affirmed. (*Marie M. E. Church v. Trinity M. E. Church*, 205 Ill. 601.) Afterward said appellee filed the bill in this case in the circuit court, adding its pastor and a member of the church as complainants, against the appellants, and praying for the same relief. The appellants filed a plea of *res judicata*, setting up the former decree and judgment of this court in bar. The plea was set down for argument and held bad. The appellants then answered the bill, set-

ting up the former judgment and alleging that it was *res judicata*, and further answering the facts alleged in the bill. The issues were referred to a master in chancery, who took the evidence and reported in favor of the appellees. The court overruled objections to the report and entered a decree in accordance with the prayer of the bill. From that decree this appeal was taken.

There was identity of parties and subject matter in the two suits, and the rule is, that in such a case the question which was in issue and judicially passed upon and determined in the first suit is conclusively settled by the judgment and cannot be again litigated in another action between the same parties. (*Noyes v. Kern*, 94 Ill. 521; *Hanna v. Read*, 102 id. 596; *Wright v. Griffey*, 147 id. 496; *Louisville, New Albany and Chicago Railway Co. v. Carson*, 169 id. 247; *People v. Hill*, 182 id. 425.) A complainant must present all the grounds showing his right to the relief prayed for which could have been presented, and if he does not, he will not be allowed in a second suit to take advantage of the omission. All questions relating to the same subject matter which were open to consideration and could have been presented are conclusively settled, whether they were presented or not. (*Bailey v. Bailey*, 115 Ill. 551; *Harmon v. Auditor of Public Accounts*, 123 id. 122; *Lusk v. City of Chicago*, 211 id. 183.) The former judgment must be upon the merits, but a judgment on demurrer is as conclusive as a judgment from a finding of the facts alleged in the bill. (*Nispel v. Laparle*, 74 Ill. 306.) Inasmuch as a judgment upon demurrer must be upon the merits to operate as a bar to a subsequent suit, such a judgment, by reason of a defective pleading or because a complainant has mistaken his remedy, which was at law instead of in equity, will not operate as a bar to a subsequent suit where the cause of action is well pleaded or the suit is in the proper forum. (*Farwell v. Great Western Telegraph Co.* 161 Ill. 522; *Farmers and Me-*

chanics Life Ass'n v. Caine, 224 id. 599.) But where parties choose to present issues of law on the merits by demurrer, they are concluded just as much as though the judgment was upon a hearing. (*Vanlandingham v. Ryan*, 17 Ill. 25.) The same legal consequences follow whether the allegations of the bill are admitted by demurrer or proved. (*Northern Pacific Railroad Co. v. Slaght*, 205 U. S. 122.) A defective pleading does not mean a statement of a defective title or of facts which do not entitle a complainant to the relief prayed for. A demurrer to a bill for want of equity is always to the merits. In *Stow v. Russell*, 36 Ill. 18, where there was such a demurrer, the court said: "In chancery a demurrer is always to the merits and in bar of the relief sought, and proceeds upon the ground that, admitting the facts stated in the bill to be true, the complainant is not entitled to the relief he seeks." This was repeated in *Harris v. Cornell*, 80 Ill. 54. The facts were properly alleged in the former bill and the complainant was bound to allege every fact that would entitle it to the relief prayed for. The case comes within the rule stated in *Vanlandingham v. Ryan*, *supra*, where the court said: "For it may be that the cause of action is well set forth and the judgment proceed upon the ground that the cause is not sufficient to sustain an action. I should hold such judgment a bar to another action varying the statement and allegations or changing even the form of the action. Such decision would be upon the merits and very right set up, and may as well be determined, concluded and barred on an issue of law by demurrer as upon an issue of fact."

It is contended by counsel for appellees that the former judgment was not on the merits but for a defective pleading. That is not true. In the bill the Marie church claimed an equitable title in fee simple in the premises and alleged the facts on which that claim was founded. If the appellants had answered and the bill had been dismissed after

a hearing in which the facts alleged were proved, it would not be thought that the decision was not on the merits, and it makes no difference whether a complainant is first compelled to prove the facts and the objection is then made that he is not entitled to the relief prayed for, or the defendant does not compel the complainant to prove the facts but admits them.

It is also contended that the former judgment was not *res judicata* because of the additional fact not alleged in the first bill, and because the question involved has been decided differently from our decision by the general conference of the Methodist Episcopal church. The additional fact is, that after the trustees of the First church passed a resolution directing its treasurer to pay toward the construction of the mission building \$10,000, provided Higinbotham, who had purchased the lots for the building, should convey them to said First church within three years, to be held by it until there was a legally incorporated church to take and hold the property, the official board of the Trinity church adopted a report of its committee that the very liberal donation of the lots purchased by Higinbotham at a cost of \$7500, and the donation of \$10,000 by the First church, be accepted with hearty thanks. The record of this action by the official board had been mislaid when the first bill was filed, and the argument is that it was newly discovered evidence which satisfied the Statute of Frauds and created an express trust. The master found that the resolution satisfied the Statute of Frauds and was sufficient to prove an express trust, and the chancellor approved that finding. Whether it was proper practice to ignore the former suit and file the bill in this case on account of newly discovered evidence need not be considered, for the reason that the finding was clearly wrong. The provision of the statute is, that "all declarations or creations of trusts or confidences of any lands, tenements or hereditaments, shall be manifested and proved by some

writing signed by the party who is by law enabled to declare such trust, or by his last will in writing; or else they shall be utterly void and of no effect." (Hurd's Stat. 1909, sec. 9, p. 1197.) There was no declaration of trust in the action of the official board and it was not by law enabled to declare a trust. A trust may be declared by a grantor in a will or deed by which land is conveyed or devised, or in a separate instrument, and a grantee to whom land is conveyed may declare that he holds it in trust. (Pomeroy's Eq. Jur. sec. 1007; 28 Am. & Eng. Ency. of Law,—2d ed.—877; *Myers v. Myers*, 167 Ill. 52.) Higinbotham did not convey the property to the Trinity church in trust, and the Trinity church never declared any trust after it acquired the title. While the writing need not be framed for the express purpose of declaring a trust, it must not only show that there is a trust, but what it is, since the trust must be manifested and proved by the writing. (*Kellogg v. Peddicord*, 181 Ill. 22.) It was a fact passed upon in the first suit that the First church made a donation of \$10,000, which was used in the construction of the building, and a writing showing that the official board of the Trinity church accepted the donations of Higinbotham and the First church with hearty thanks had no more effect as a declaration of trust than the acceptance and use of the money had. This case is not different from the former one on the ground that there was an express trust. In the former suit it was claimed that there was a trust which was excepted by the Statute of Frauds, which provides that resulting trusts created by construction, implication or operation of law need not be in writing and may be proved by parol. The newly discovered evidence only tended to prove what was before admitted by the demurrer, and the admission even went farther and included an agreement on the part of Higinbotham to make the conveyance in trust, which does not appear in this case. If there was a constructive trust arising from fraud or the

violation of some obligation, so that a court of equity would impress a trust upon the conscience of the holder of the legal title and convert such holder into a trustee, the question was involved in the former suit equally with this one. The former judgment was *res judicata*, and the chancellor erred in holding the plea bad and in entering the decree.

The other fact alleged is, that the general conference of the Methodist church decided contrary to the decision of this court, and it is insisted that such decision is binding on the parties and this court. The judicial power and the authority to adjudicate upon civil and property rights is vested in the courts and is not committed to ecclesiastical tribunals. The courts, however, accept the decisions of the highest tribunals of churches upon questions of faith and doctrine, and where the ownership of property is dependent upon the decision of such a question they will follow the construction of the ecclesiastical tribunal and adjudge the title to the property accordingly. When a property right is involved it is the civil court that is to decide the question and an ecclesiastical tribunal cannot usurp its functions, but the civil court having respect for the authority of the ecclesiastical tribunal upon ecclesiastical questions, adopts the ecclesiastical decision out of which the civil right arises. (*Schweiker v. Husser*, 146 Ill. 399; *First Presbyterian Church v. Cumberland Church*, 245 id. 74; *Watson v. Jones*, 13 Wall. 679.) The general conference did not determine an ecclesiastical question but decided upon the property rights of the parties to this litigation, and we cannot admit the authority of the general conference to determine such rights.

The decree is reversed and the bill is dismissed.

Decree reversed and bill dismissed.

HENRY SCHMIDT *et al.* Appellees, *vs.* SWAN A. ANDERSON
et al. Appellants.

Opinion filed Dec. 21, '11—Leave to file petition denied Feb. 9, '12.

1. **STATUTES**—*statutes should be so construed, if possible, as to give all parts a meaning.* Statutes should be so construed as to give all parts a reasonable meaning if it is possible to do so.

2. **SAME**—*Mechanic's Lien statute must receive strict construction.* Mechanic's liens exist only by virtue of statutes creating them and providing for their enforcement, and such statutes must be strictly construed with reference to the requirements on which the right to a lien depends.

3. **MECHANICS' LIENS**—*purpose of amendment of 1903 of sections 1 and 7 of Mechanic's Lien law.* The purpose of the amendment of 1903 of sections 1 and 7 of the Mechanic's Lien law was to permit a contractor to file one claim against separate buildings on lots which are not adjacent to or adjoining each other, provided the work was done or material furnished for all of such buildings under one entire contract.

4. **SAME**—*purpose of requiring a claim to be filed within stated time.* The purpose of the provision of the Mechanic's Lien law requiring a claim for lien to be filed within a stated time is to notify third persons dealing with the property of the existence, nature and character of the lien as well as the times when the material was furnished and labor performed, thus enabling them to determine from the claim itself whether it can be enforced.

5. **SAME**—*when claim against buildings on non-adjacent lots must be filed.* Where work is done and materials are furnished under one entire contract for buildings upon lots not adjoining or adjacent to each other the claim for lien must be filed within four months after the work is performed or the material is furnished for each of the buildings, and a claim for lien filed within four months after the completion of the last building is not good as to buildings on which the last work was done or materials furnished more than four months before the claim was filed, if the rights of third persons have intervened.

6. **SAME**—*when claim for lien against several buildings cannot be enforced at all.* A claim for lien against several buildings on lots not adjoining or adjacent, on which the work was done and materials were furnished under one entire contract, cannot be enforced at all, even though filed within four months after the completion of the last building, where the other buildings were com-

pleted and sold more than four months before the claim was filed, and where there is nothing in the claim from which it can be ascertained how the amount claimed for work and materials is to be apportioned among the several buildings.

APPEAL from the Circuit Court of Henry county; the Hon. EMERY C. GRAVES, Judge, presiding.

MORSE & DEMERATH, and WILSON & CUMMINGS, for appellants.

N. F. ANDERSON, and JAMES H. ANDREWS, for appellees.

Mr. CHIEF JUSTICE CARTER delivered the opinion of the court:

This is a mechanic's lien proceeding brought in the circuit court of Henry county by appellees, against appellants, under the Mechanic's Lien law of 1903. Appellees testified that on March 15, 1907, they made an oral contract with appellant Swan A. Anderson, whereby they agreed to install gas fittings, electric wiring, plumbing, heating apparatus and make the sewer connections for four houses to be erected upon four separate lots in Kewanee owned and possessed by said Anderson, for \$2550. The claim for said lien was filed May 14, 1908, and this proceeding was instituted in the circuit court January 9, 1909. The decree of the circuit court found that said four buildings had been completed and that there was still due and unpaid to appellees under said contract \$1505.80, with interest from March 14, 1908,—a total of \$1751.95,—and that appellees have a lien on all four buildings therefor. From that decree this appeal has been prayed directly to this court on the ground that if the Mechanic's Lien statute be construed as it is necessary to construe it in order to uphold the decree of the trial court, said statute is unconstitutional.

It is first contended by appellants that the trial court improperly construed the Mechanic's Lien statute. Parts of

section 7 (paragraph 21) which are necessary to be considered (in connection with other portions of the statute) read as follows: "No contractor shall be allowed to enforce such lien against or to the prejudice of any other creditor or encumbrancer or purchaser, unless within four months after completion, or if extra or additional work is done or material is delivered therefor within four months after the completion of such extra or additional work or the final delivery of such extra or additional material, he shall either bring suit to enforce his lien therefor or shall file * * * a claim for lien: * * * *Provided further*, that in the event that the contract relates to two or more buildings on two or more lots or tracts of land, then all of said buildings and lots or tracts of land may be included in one statement of claim for a lien." (Hurd's Stat. 1909, p. 1431.)

The evidence shows that one of the houses was situated on Division street, two on Prospect street, and one (a double house) on East Oak street; that all four houses were completed and all of the work performed on them, whether extra or otherwise, by the middle of November, 1907, excepting the Oak street house; that the last work was performed on the Oak street house March 14, 1908. The two houses on Prospect street and the one on Division street were sold and deeds delivered and recorded and possession taken before November 15, 1907. The Oak street house was sold and possession taken about September 23, 1907. The claim for lien and the bill filed in this proceeding do not designate which portion of the work or material was furnished for any special house, nor the time when such work was performed or the material furnished for each house. The only statement they contain on those points is that the first work was performed and material furnished about April 1, 1907, and the last March 14, 1908.

Previous to the passage of said act of 1903 a contractor could not file a single claim for lien for the whole amount due him for labor and materials for the erection of houses

on lots which were not adjoining or adjacent to one another, even though all labor was performed or materials were furnished under one contract. (See *Aurand v. Martin*, 188 Ill. 117, rendered in 1900, construing the Mechanic's Lien law of 1895.) Manifestly, the present act, as amended in 1903, was passed (and especially the amendments to sections 1 and 7) for the purpose of permitting the contractor to file one claim against separate buildings on lots that were not adjacent to or adjoining each other, provided the work was performed or material furnished for all of such buildings under one entire contract. The vital question in this case is whether the legislature intended by these changes to permit such a claim to be filed against buildings erected on several different lots under one entire contract, even though the work on some of the houses had been performed and the materials for such houses were furnished more than four months before the claim for lien was filed or the suit begun to enforce the lien. The purpose of requiring the claim to be filed within a stated time is, that third persons dealing with the property may have notice of the existence, nature and character of the lien as well as the times when the material was furnished and labor performed, and thus be enabled to learn from the claim itself whether it was such as can be enforced. That this was the purpose has been held by this court. (*Buckely v. Commercial Nat. Bank*, 171 Ill. 284, and cases cited.) To give the construction to this act contended for by appellees and found by the trial court in its decree would practically nullify that part of section 7 which provides that no lien shall be enforced to the prejudice of any other creditor, encumbrancer or purchaser unless within four months the claim for lien is filed or suit begun. In this case, as to three of the houses it is conceded that the work was all performed and the material furnished more than six months before the claim for lien was filed, and that these houses had all been sold by appellant Anderson to three

other appellants about six months before such claim was filed. It is a fundamental rule in the construction of statutes that they should be so construed as to give all parts a reasonable meaning if it is possible to do so. In our judgment the legislature did not intend to permit two or more buildings on two or more tracts of land to be included in one claim for lien unless the claim was filed within four months after the last labor was performed or the material furnished on each of the buildings. The authorities cited by counsel for appellees from other States cannot be decisive because they are upon statutes worded differently from ours.

Had this claim for lien stated specifically as to when the last work was performed or material furnished on each of the separate houses, then, if the labor was performed or material furnished, in accordance with said statement, on any particular house within four months of the time the claim was filed, a claim for such labor and material furnished on that house could have been enforced as a lien thereon, even though the labor or material for any of the other houses was shown to have been performed or furnished more than four months before the claim was filed. As mechanics' liens were not recognized by the common law or in equity but exist only by virtue of statutes creating them and providing a method for their enforcement, such statutes must be strictly construed with reference to those requirements upon which the right depends. (*Turnes v. Brenckle*, 249 Ill. 394.) We are therefore constrained to hold that this claim for lien cannot be enforced, even for labor performed or material furnished as to the Oak street house, because there are no data in the claim wherefrom the proper amount could be apportioned to that house. See *Kendall v. Fader*, 199 Ill. 294.

In view of the conclusion we have reached that the court by its decree did not construe the statute correctly, it is unnecessary for us to pass on the question whether the

statute as construed by the trial court would be unconstitutional as authorizing the taking of property without due process of law.

The conclusion that we have reached makes it impossible for any recovery to be had in this proceeding. The decree of the circuit court will therefore be reversed.

Decree reversed.

LOUIS S. COHEN *et al.* Appellants, *vs.* JOSEPH SEGAL *et al.*
Appellees.

Opinion filed December 21, 1911—Rehearing denied Feb. 8, 1912.

1. SPECIFIC PERFORMANCE—*party not required to do a useless thing before he can maintain bill.* Where it is shown by the bill for specific performance of a contract to exchange lands that the defendants unconditionally refused to perform and that complainants were willing and anxious to perform the contract at all times from its date to the filing of the bill, the refusal of the defendants to perform excuses the failure of the complainants to make a tender of the abstract or guaranty policy to the defendants, as the law does not require a party to do a useless thing before he can maintain a bill for specific performance.

2. SAME—*when delay in filing bill does not defeat right to relief.* A delay of nearly a year in filing a bill for specific performance of a contract for the exchange of lands does not deprive the complainants of the right to relief, even though defendants refused to perform a few days after the contract was executed, where the complainants were ready to perform and were repeatedly asking the defendants to perform without litigation, and where no material change in the value of the properties has occurred, no rights of third persons have intervened and no change in the position of the defendants has been caused by the delay.

3. SAME—*when fact that complainants recorded contract does not bar right to relief.* The fact that the complainants, after the defendants refused to perform a contract, which was held by a third party in escrow, recorded the contract without the consent of the defendants, is not such inequitable conduct as bars them from equitable relief by way of specific performance, where the contract does not provide, in terms, that it shall not be recorded.

4. SAME—*fact that husband or wife does not sign contract does not render it unenforceable.* The fact that the husband or wife of the owner of the fee does not sign a contract made by such owner for the sale of the land, to be consummated at some future date, does not render the contract unenforceable for the want of mutuality, as the inchoate right of dower is, at most, a mere encumbrance, which may be removed by the owner of the fee by tendering a deed in which the husband or wife joins and releases such right. (*Gage v. Cummings*, 209 Ill. 120, distinguished.)

COOKE, J., dissenting.

APPEAL from the Superior Court of Cook county; the Hon. W. F. COOPER, Judge, presiding.

This is an appeal from the decree of the superior court of Cook county sustaining a demurrer to and dismissing for want of equity an amended bill filed by the appellants, Louis S. Cohen and Anna Krasa, praying for specific performance of a written contract for the exchange of lands, entered into by them with the appellees, Joseph Segal and Rose Segal.

It appears from said amended bill that on February 21, 1910, appellants, Louis S. Cohen and Anna Krasa, were the owners in fee of certain premises located at the southwest corner of Halsted street and West Fourteenth place, in the city of Chicago, and the appellee Joseph Segal was the owner in fee of certain premises known as Nos. 618 and 620 South Hermitage avenue, in said city of Chicago; that on the said date said parties entered into a written contract, by which appellants agreed to convey to appellees, by general warranty deed, including all estate of homestead and all rights of dower therein, at a consideration of \$44,000, the Halsted street property, subject to certain leases, taxes, assessments and an encumbrance of \$17,000, and in exchange said appellees agreed to convey to appellants by general warranty deed, including all estate of homestead and all rights of dower therein, at a consideration of \$21,000, the Hermitage avenue property, subject to certain

leases, taxes, assessments, etc., and to an encumbrance of \$9000, and to pay at the date of exchange of deeds the sum of \$1000 cash and \$14,000 in monthly installments of \$100 each until paid, to be secured by notes and a trust deed on the Halsted street property; that each was to furnish the other, within a reasonable time, a complete merchantable abstract of title or copy thereof, or a merchantable title guaranty policy, showing a good and sufficient title in the respective parties, and ten days were to be allowed to examine the title and sixty days to cure defects therein; that all notices required to be given were in all cases to be construed as notices in writing; that interest and insurance premiums were to be adjusted as of the date of delivery of deeds, and all deeds to be passed and the negotiation closed at the office of John C. Krasa within five days after the titles had been found good; that time was declared to be of the essence of the contract, and the contract was to be held by the Chicago Title and Trust Company for the mutual benefit of the parties concerned; that the contract was signed by Anna Krasa, by John C. Krasa, her agent, and by Louis S. Cohen, Joseph Segal and Rose Segal, his wife. It further appears from said amended bill that within two or three days after the execution of said contract, on February 21, 1910, appellee Joseph Segal notified the appellants that he would not carry out said contract, and the appellants immediately informed said Segal they would hold him to the contract and that they intended to proceed with the same and requested him to proceed with the execution of the contract, and in like manner requested his wife, Rose Segal, to proceed with said contract, but that said Joseph Segal and Rose Segal both stated that they would have nothing further to do with the contract and would not carry out the same in any respect or deliver any abstract or policy, and that appellees at frequent intervals thereafter persisted in such refusal; that appellants stated in reply on all such occasions that they were ready to perform their

part of the contract. The bill further recites the abstract of title to the property owned by appellants was in the possession of the mortgagee, who refused to surrender it to appellants but informed appellants that the attorney of the appellees could examine such abstract at the mortgagee's office; that appellants communicated this information to appellees, and also informed them that they would furnish a new abstract or policy within twenty days after the execution of said contract; that appellees stated they did not care what appellants did, and would not continue with the execution of said contract. The bill further recites that appellants hoped and believed appellees would reconsider their repudiation of the contract, and filed the contract for record in the recorder's office of Cook county on February 24, 1910, and endeavored to persuade the appellees to proceed with the contract without appellants being compelled to resort to litigation; that on September 26, 1910, appellants tendered a warranty deed of the premises owned by them to appellee Joseph Segal, which deed was signed and acknowledged by appellants and by their respective spouses, and also tendered a guaranty policy of their premises showing their title on August 31, 1910; that on November 4, 1910, the same tender was made to Rose Segal, Joseph's wife; that appellees again refused to accept the deed or policy or to carry out the contract; that appellants have at all times been ready, willing and able to carry out the contract; that the tender of their deed and policy was delayed because of the refusal of the appellees to perform and the endeavors of appellants to cause appellees to proceed to the execution of the contract without litigation.

To the amended bill appellees interposed a demurrer for the following causes: First, the amended bill did not state a case which would entitle appellants to equitable relief; second, the contract set out in the amended bill is void as a contract for want of mutuality of obligation and remedy and cannot be specifically enforced; third, the conduct of

the appellants has not been correct and appellants did not come into equity with clean hands; fourth, the appellants did not perform the parts of the contract to be performed by them; fifth, the delay of the appellants in prosecuting this cause constituted *laches* and amounted to abandonment of their right to specific performance.

VINCENT D. WYMAN, and OTTO W. JURGENS, for appellants:

The bill shows the unconditional refusal of the defendants to perform. This constituted a sufficient excuse for the failure of complainants to make any tender of an abstract or guaranty policy or of a deed. After such refusal they were not required to do anything further under the contract. Equity will not require the performance of an idle act. *Scott v. Beach*, 172 Ill. 273; *Bucklen v. Hasterlik*, 155 id. 423; *Lyman v. Gedney*, 114 id. 391.

The defendants having declined to perform their part of the contract, all further performance by complainants was unnecessary. The defendants are estopped from setting up as a defense to the bill that time was of the essence of the contract. *Lyman v. Gedney*, 114 Ill. 391.

The rule as to mutuality of remedy *ab initio* has application only to cases where the vendor is without that which he agreed to convey, or any interest in it. It has no application to a case where the vendor has title to some extent but it is defective or encumbered in some particular. *Blanton v. Warehouse Co.* 120 Fed. Rep. 318.

If the vendee, at the time of the contract, knew it would take time to perfect the title or the consent of some other party to make the title good, the original want of mutuality of remedy cannot be interposed as a defense. 26 Am. & Eng. Ency. of Law, (2d ed.) 115; *Gibson v. Brown*, 214 Ill. 335.

The modern doctrine is, that if, at the time when by the terms of the contract the vendor is required to perform,

he is in a position to be compelled to perform, the objection of original want of mutuality cannot be urged and the contract will be specifically enforced. In other words, the mutuality of remedy need not exist before the time the court is asked to decree the performance of the contract. *Construction Co. v. Kuper*, 90 Md. 540; *Brown v. Munger*, 42 Minn. 486; *Dressel v. Jordan*, 104 Mass. 414; *Logan v. Bull*, 78 Ky. 617; *Johnson v. Higgins*, 77 Neb. 37; *Day v. Mountin*, 137 Fed. Rep. 763; *Smith v. Gansler*, 83 Ky. 371; *Krah v. Wassmer*, 71 Atl. Rep. 404; *Isaacs v. Skranker*, 95 Mo. 322; *Reeves v. Dickey*, 10 Gratt. 138; 26 Am. & Eng. Ency. of Law, (2d ed.) 115; 36 Cyc. 627, 628; Waterman on Specific Performance, sec. 199; *Richards v. Green*, 23 N. J. Eq. 536; Pomeroy on Specific Performance, sec. 166, note on p. 237; *Gibson v. Brown*, 214 Ill. 335.

Where the consent of a third person is required to the complete performance of the contract, courts have in some cases presumed such consent might be obtained until the contrary was shown. *Lyman v. Gedney*, 114 Ill. 388; *Jacobson v. Rechnitz*, 46 Misc. (N. Y.) 135; *Arnold v. Hull*, 7 Grant's Ch. 47.

It is no objection to the specific performance of the contract that the consent of a third person is necessary to its performance, where it is shown that he does or will consent. 36 Cyc. 573, 627.

A delay which neither evidences an abandonment of a right nor operates to the prejudice of the other party is not a defense to action of specific performance. 36 Cyc. 730.

Where the elements, conditions and incidents are such as equity deems essential, it is as much a matter of course for a court of equity to decree specific performance of a contract as it is for a court of law to allow damages for its breach. *Day v. Improvement Co.* 153 Ill. 293; *McClure v. Otrich*, 118 id. 320; *Railroad Co. v. Brubaker*, 217 id. 462; *Fowler v. Fowler*, 204 id. 82.

BERTRAM J. CAHN, for appellees:

It is not sufficient, in a bill for specific performance, to show the adverse party in default, but the party complaining must show he is not liable to the same imputation. *Short v. Kieffer*, 142 Ill. 266; *Bates v. Wheeler*, 1 Scam. 54; *Doyle v. Teas*, 4 id. 202.

The fact that appellees may have refused to carry out the contract does not relieve appellants from the performance of the acts required of them by the contract, when such acts are necessary to place them in a position to file a bill for specific performance. *Brink v. Steadman*, 70 Ill. 241; *Bothwell v. Schmidt*, 248 id. 586.

A court of equity will not compel the spouse of a vendor of land to convey his or her right of dower therein when such spouse does not join in the contract for such conveyance. *Humphrey v. Clement*, 44 Ill. 299; *Mathison v. Wilcox*, 87 id. 51; *Mix v. Baldwin*, 156 id. 313; *Cowan v. Kane*, 211 id. 572; *Casstevens v. Casstevens*, 227 id. 547; *Plum v. Mitchell*, 26 S. W. Rep. 391; *Schoonmaker v. Bonnie*, 23 N. E. Rep. 1106; *Barber v. Hickey*, 24 L. R. A. 736.

A vendor knows, when he enters into a contract to sell real estate in which his spouse does not join, that he takes the chance, as well as the vendee, that the spouse may not join in the deed, and neither can compel specific performance in case of the refusal to join. *McCoy v. Niblich*, 70 Atl. Rep. 577.

A contract, to be specifically enforced by a court of equity, must be mutual at the time it was entered into, so that it might at that time have been enforceable by either of the parties against the other. Mutuality of remedy must exist at the inception of the contract. Fry on Specific Performance, sec. 286; 2 Beach on Contracts, sec. 885; Pomerooy on Contracts, (2d ed.) sec. 166; *Baird v. Linthicum*, 1 Md. Ch. 345; *Duvall v. Myers*, 2 id. 401; *Tryce v. Dit-*

tus, 199 Ill. 189; *Luse v. Deitz*, 46 Iowa, 205; *Gibson v. Brown*, 214 Ill. 331; *Cowan v. Curran*, 216 id. 598; *Norris v. Fox*, 45 Fed. Rep. 406; *TenEyck v. Manning*, 27 Atl. Rep. 900; *Gage v. Cummings*, 209 Ill. 120; *Kuhn v. Eppstein*, 219 id. 154; *Sayer v. Humphrey*, 216 id. 431; *Smith v. Hunter*, 241 id. 514.

Where one party to a contract gives notice to the other that he will not perform the contract and expressly repudiates it, a comparatively brief delay in asserting his right to enforce the contract will be considered as an acquiescence in the notice and abandonment of the right to specific performance. Fry on Specific Performance, sec. 1079; Pomerooy on Specific Performance, 416, 425; 26 Am. & Eng. Ency. of Law, (2d ed.) sec. 9; 36 Cyc. 728; *McDermid v. McGregor*, 21 Minn. 111; *Banks v. Burnam*, 61 Mo. 76; *Watson v. Reid*, 1 R. & M. 237; *Heapy v. Hill*, 2 S. & S. 30; *Guest v. Humphrey*, 5 Ves. Jr. 818; *Ketcham v. Owen*, 36 Atl. Rep. 1095; *Walker v. Jeffreys*, 1 Hare, 341; *Colby v. Gadsden*, 34 Beav. 418.

The party asking specific performance of a contract must show that his conduct has been fair. He who seeks equity must do equity. *Mitchell v. King*, 77 Ill. 462; *Doyle v. Teas*, 4 Scam. 202; *Winslow v. Noble*, 101 Ill. 198; *Eastman v. Plumer*, 46 N. H. 464.

In case a contract for the sale of land is placed in the hands of a third person to be held in escrow, it should not be placed of record without the agreement of the parties, and if it is recorded, a court of chancery can set it aside as a cloud upon the title of the owner. *Larmon v. Jordan*, 56 Ill. 204; *Sea v. Morehouse*, 79 id. 216; *Lane v. Lesser*, 135 id. 567; *Sugar v. Froehlich*, 229 id. 397.

Mr. JUSTICE HAND delivered the opinion of the court:

The first contention of the appellees in support of the judgment sustaining the demurrer to the bill filed herein is, that the bill shows that the appellants did not perform

the provisions of the contract to be performed on their part and for that reason they were not entitled to maintain their bill. It is shown by the averments of the bill that the appellees refused to perform and that the appellants were anxious, ready and willing to perform at all times from the date of the contract to the date they filed their bill, and this, we think, constitutes a sufficient excuse for the failure of appellants to make a tender of an abstract or guaranty policy to appellees. The law does not require a party to a contract to do a useless thing before he can maintain a bill for specific performance. In *Lyman v. Gedney*, 114 Ill. 388, it was said, on page 410: "To the objection that time was of the essence of the contract and appellee did not tender a sufficient deed within the time, it is enough to say, appellant, by previously refusing to comply with the contract, is estopped from urging that objection. * * * The law did not require appellee to go through with a form which appellant had previously apprised him would be idle and useless." In *Scott v. Beach*, 172 Ill. 273, on page 278: "An actual tender by the plaintiff before suit brought is unnecessary when from the acts of the defendant or from the situation of the property it would be wholly nugatory—a mere useless form. If, before or at the time of completion, the defendant has openly and avowedly refused to perform his part or declared his intention not to perform at all events, then the plaintiff need not make a tender or demand its performance before bringing suit. It is enough that he is ready and willing and offers to perform in his pleading." In *Osgood v. Skinner*, 211 Ill. 229, on page 234: "The law does not require a needless formality, and an actual tender is unnecessary where the seller is ready, able and willing to perform on his part and the tender would be a mere useless form. If, before or at the time of performance, the purchaser has declared his intention not to perform or refuses to do so, the seller need only prove that he was ready and willing to perform on his part."

It is next contended that by reason of the delay of the appellants in filing their bill they are barred of relief. The contract bore date of February 21, 1910, and a few days thereafter the appellees repudiated their contract. The appellants repeatedly asked them to perform up to September 26, when they tendered a deed and guaranty policy, which tender was refused. The deed and policy were again tendered on November 4, 1910, and on February 10, 1911, the bill was filed. No material change in the value of either of the properties is averred to have occurred and the rights of no third person have intervened, and there was no such delay in seeking relief as would bar a court of equity from specifically enforcing said contract. The general rule is, that a delay which neither evidences an abandonment of the contract nor operates to the prejudice of the other party is not a defense to a bill for specific performance. (36 Cyc. 730.) Here the appellants were from the outset insisting on performance, and the position of the appellees has not been changed by reason of the delay. It is undoubtedly the law that an unreasonable delay in filing a bill to specifically enforce the performance of a contract for the sale of real estate will defeat a recovery, but no case has been cited where a delay of less than one year has been held fatal to a recovery, and the surrounding circumstances of each particular case will be controlling. In *Coryell v. Klehm*, 157 Ill. 462, this court said, on page 473: "A court of equity applies the doctrine of *laches* in denial of relief only where, from all the circumstances, to grant the relief to which the complainant would otherwise be entitled will, presumptively, be inequitable and unjust, because of the delay. (*Stiger v. Bent*, 111 Ill. 328.) And a demurrer for want of equity cannot be sustained unless the court is satisfied that no discovery or proof, properly called for by or founded upon the allegations in the bill, can make the subject matter of the suit a proper case for equitable cognizance.—*Bleeker v. Bingham*, 3 Paige, 246."

It is further contended that the appellants committed a fraud upon the appellees by recording the contract without the consent of the appellees and that they did not come into equity with clean hands. The appellees had repudiated their contract, and it was not inequitable that appellants should cause the contract to be recorded to protect their rights as against third parties. The contract did not provide, in terms, it should not be recorded, and the appellants were not barred of equitable relief by their act in recording the contract.

It is finally urged that the contract was lacking in mutuality and for that reason it should not be specifically enforced. It is true that the contract was not signed by the wife of Cohen and the husband of Krasa, and it could not be specifically enforced against them, (*Ebert v. Arends*, 190 Ill. 221; *Humphrey v. Clement*, 44 id. 299; *Cowan v. Kane*, 211 id. 572;) but it was binding upon Cohen and Krasa and could be specifically enforced against them, and the wife of Cohen and the husband of Krasa made no objection to the contract being carried out but joined in executing the deed which was tendered to the Segals. The inchoate right of dower is not an estate in lands but at most is a mere encumbrance, and there is no more reason why the husband or wife should sign a contract for the sale of lands than that a mortgagee or judgment creditor should sign a contract agreeing to release his lien, if the vendor is prepared with a release of the inchoate right of dower, when he is ready to close the sale according to the terms of the contract, and if, as here, the vendor was the owner of the fee at the time the contract was made and at the appointed time tendered to the vendee his title, free of all encumbrances, including the inchoate right of dower, in accordance with the terms of his contract, the vendee can not decline to perform because the title was encumbered by an inchoate right of dower at the time the contract was executed. (*Gibson v. Brown*, 214 Ill. 330.) In *Mason v.*

Caldwell, 5 Gilm. 196, it was said, on page 208: "Equity may enforce the specific performance of a contract for a sale of land although the vendor has no title at the time of the sale or even at the time of filing the bill, so as he can make a good title at the time of the decree." In a leading Maryland case (*Maryland Const. Co. v. Kuper*, 90 Md. 540,) it was said: "While it is true that a vendor must be ready and able to convey a marketable title to a purchaser, it is not necessary that he possess such a title at the time the contract is entered into, provided he shows that he made the contract in good faith and was able to convey it when called upon by his contract to do so. The great weight of authority is that he is only required to be able to convey it by the time the decree is entered. * * *

The authorities are therefore ample to establish the doctrine that the mere fact that the vendor's property is encumbered or his title is defective at the time the contract of sale is made will not prevent his enforcing the contract in equity if he has removed the encumbrance and perfected the title by the time he is required by his contract to convey it; and generally, when he has acted in good faith relief will be granted him if he is ready to furnish a clear title at the time of the decree, provided the delay has not prejudiced the purchaser and time is not of the essence of the contract." While in this case the contract states that time is the essence of the contract, it was expressly provided therein that the parties were to have sixty days in which to perfect their respective titles, clearly showing that it was the intention of the parties that there might be imperfections to be cured and encumbrances to be removed before the deal was closed, and as the dower rights of the wife and husband of the appellants had been released before the title was tendered to appellees, we have reached the conclusion that the fact that the wife and husband of the appellants did not join in the contract is no defense to this bill. The case of *Gage v. Cummings*, 209 Ill. 120, is not like the case

at bar, as in that case the contract was not executed by the owner of the fee, as was the case here.

We are of the opinion that it was error to sustain the demurrer to appellants' bill. The judgment of the superior court will therefore be reversed and the cause remanded to that court, with directions to overrule the demurrer.

Reversed and remanded, with directions.

Mr. JUSTICE COOKE, dissenting:

I disagree with the view of the majority that this case is unlike that of *Gage v. Cummings*, 209 Ill. 120. It is my opinion that the principle governing is the same here as it was there, and as a consequence the holding of the majority here is in direct conflict with the holding in that case. Under the holding here, instead of attempting to distinguish the two cases, the *Gage* case should have been expressly overruled.

B. A. FRANKLIN, Admr. *et al.* Appellees, vs. IDA SMITH
HASTINGS *et al.* Appellants.

Opinion filed December 21, 1911—Rehearing denied Feb. 8, 1912.

1. WILLS—*gift to aid in establishing public library is a gift to charity.* A gift to aid in the establishment and support of a public library is a gift to charity, and such gifts are looked upon with particular favor by the courts, and every presumption consistent with the language used will be indulged to sustain them.

2. SAME—*the gift to charity is regarded as the matter of substance.* If the testator has manifested a general intention to give to charity the charity is regarded as the matter of substance, and the gift will be sustained though it may not be possible to carry it out in the manner indicated.

3. SAME—*a gift to charity is not within rule against perpetuities.* The statute of Elizabeth concerning charitable uses (43 Eliz. chap. 4,) is in force in Illinois, and its effect is to exclude conveyances and devises to charitable uses from the operation of the rule against perpetuities.

4. SAME—*when a gift to charity will not be held invalid.* A gift in trust for a charity not in existence and the beginning of whose existence is uncertain, or which is to take effect upon a contingency which may or may not happen within a life or lives in being and twenty-one years thereafter, will be upheld, provided there is no gift of the property meanwhile to or for the benefit of any individual or any private corporation.

5. SAME—*when gift to charity is direct and immediate.* The words, "For the purpose of aiding in the establishment and support of a public library in the village of Lexington, Illinois, and in honor of my deceased parents, I direct, empower and authorize my executor to hold and apply the sum of ten thousand (\$10,000) dollars as follows," etc., constitute a direct and immediate gift to charity, notwithstanding the testatrix adds conditions referring to the time and manner of the enjoyment of the gift.

6. SAME—*what does not render gift to charity invalid.* A direct gift for the purpose of aiding in the establishment of a public library is not rendered invalid by provisions requiring the organization of a regularly incorporated library association which shall include in its name the name "Smith;" that a fund be raised by the people for establishing and maintaining the library, which need not exceed \$5000, and that the building to be erected with the proceeds of the gift have inscribed upon it in some appropriate place the words, "The Smith Library."

7. SAME—*the effect of renunciation upon residuary bequests.* Where a will gives the husband of the testatrix one-third of the estate, both real and personal, in fee, (except a specified piece of land,) gives certain pecuniary legacies, and devises the residue of the estate, one-third to the husband, one-third to a university and one-third to a library, the amount of the bequest to each residuary legatee is one-third of the value of two-thirds of the whole estate, less debts, pecuniary legacies and the excepted piece of land; and the renunciation of the will by the husband, while it may decrease, equally, the bequests to the other residuary legatees, cannot increase the amount actually bequeathed to them, and any excess in that amount will be distributed as intestate property under the statute.

8. DESCENT—*degree of relationship not affected by fact that it may be traced through two lines.* A person who is the son of a sister of the father of the testatrix and of her mother's brother is a cousin of the testatrix, and the degree of relationship is not affected by the fact it may be traced through two lines of descent.

APPEAL from the Circuit Court of McLean county;
the Hon. COLOSTIN D. MYERS, Judge, presiding.

RAYBURN & BUCK, for appellants.

W. H. STEAD, Attorney General, and STONE, OGLEVEE & FRANKLIN, (W. EDGAR SAMPSON, of counsel,) for appellees.

Mr. JUSTICE DUNN delivered the opinion of the court :

This appeal brings in review the decree of the circuit court of McLean county construing the will of Emilie S. VanDolah, who died on August 3, 1910, leaving surviving her Lewis S. VanDolah, her husband, and as her heirs the appellants, who were her cousins. Her will directed the payment of her debts and funeral expenses. She devised and bequeathed to her husband one-third of all her personal property and one-third of all her real estate in fee simple, except the south-west quarter of the premises in Lexington occupied by her as a homestead. She gave a number of pecuniary legacies. By the tenth clause of her will she devised a certain tract of land and \$10,000 for the purpose of aiding in the establishment and support of a public library in the village of Lexington, and by the twelfth clause she disposed of the residue of her estate, giving one-third to her husband, one-third to the Illinois Wesleyan University and one-third for the purpose mentioned in the tenth clause. The controversy concerns these two clauses. The husband renounced the provisions of the will. The appellants claim that the gift for the establishment and support of a library is void and that by the husband's renunciation of the will the devise of one-third of the residue to him became ineffectual, and they say that therefore the estate is intestate as to two-thirds of the residue and that they are entitled, as heirs, to that portion of the estate. The circuit court decreed adversely to both these claims.

The tenth clause of the will is as follows: "For the purpose of aiding in the establishment and support of a

public library in the village of Lexington, Illinois, and in honor of my deceased parents, I direct, empower and authorize my executor to hold and apply the sum of ten thousand (\$10,000) dollars as follows: Upon the organization of a regularly incorporated library association by the people of Lexington, Illinois, the name of which corporation shall include in it and as a part of it the name of Smith, and that upon provision being made by the people of Lexington, Illinois, and such other persons as may desire, for a fund for the use of said library association sufficient, together with the fund of \$10,000 aforesaid, to properly establish and maintain said library, the sufficiency of which fund shall be in the discretion of my said executor but which need not exceed the sum of five thousand (\$5000) dollars, then and in that case my said executor shall pay to the proper officers of said library association the said sum of \$10,000, but upon condition that such portion of said \$10,000 as my said executor shall deem proper, or all of said sum if my said executor shall deem best, shall be expended in the erection of the building for the use of such library, and the plan of said building shall be subject to the approval of my said executor; and upon the further condition that said building shall be erected upon the southwest quarter ($\frac{1}{4}$) of the premises in Lexington, Illinois, now occupied by me as a homestead, which said southwest quarter of the said premises so occupied by me as a homestead I direct, empower and authorize my executor to convey to the said incorporated company for the purpose aforesaid when in his judgment the necessary conditions have been complied with, and said building shall have inscribed upon it in some appropriate place the words, "The Smith Library." And whereas I contemplate the establishment of a library, as before described, during my lifetime, I provide further, and as qualifying what has been hereinbefore provided with reference to such a library, that in case I shall in my lifetime, either by myself or in co-oper-

ation with the people of Lexington, make donations for the establishment of a library as aforementioned, I will keep an account of the amount I shall so donate, and the amount I shall so donate shall be deducted from the \$10,000 placed at the disposal of my executor, as aforesaid."

The appellants' position as to this clause is, that the incorporation of a library association by the people of Lexington, having the name of Smith as a part of its name, and the provision of a fund for the establishment and maintenance of such library, are conditions precedent to the gift for aiding in the establishment and support of the library, and that they are uncertain events, which may not happen within the time prescribed by the rule against perpetuities, and therefore render the gift void as a violation of that rule and for uncertainty and remoteness. The Attorney General, who was a defendant, contends, on behalf of the public, that clause 10 is a valid gift to charity.

The gift for the purpose of aiding in the establishment and support of a public library was a gift to a charity. (*Mason v. Bloomington Library Ass'n*, 237 Ill. 442.) Such gifts are looked upon with peculiar favor by the courts, which take special care to enforce them, and every presumption consistent with the language used will be indulged to sustain them. If a testator has manifested a general intention to give to charity, the charity is regarded as the matter of substance, and the gift will be sustained though it may not be possible to carry it out in the particular manner indicated. (*Heuser v. Harris*, 42 Ill. 425.) The language of the bequest here is a plain direction to the executor to hold and apply \$10,000 for the purpose of aiding in the establishment and support of a public library in Lexington, and if the clause had stopped there, perhaps no question would have arisen in regard to the gift. The intention to give to the library is sufficiently manifested, but it is claimed that the subsequent provisions attach conditions to the gift which are precedent to its taking effect and

violate the rule against perpetuities. These, however, refer only to the time and manner of the enjoyment of the gift. The testatrix might have appointed trustees to carry her wishes into effect and provided for their succession in office, but she preferred a corporation authorized by law. She required the name of Smith to be used as a part of the name of the library and the provision of a fund, the minimum of which she did not fix though she stated it need not exceed \$5000. These conditions would, no doubt, in a bequest to an individual be regarded as conditions precedent to the vesting of the equitable interest and obnoxious to the rule against perpetuities. Not so in a bequest to charity. The statute of Elizabeth in regard to charitable uses (43 Eliz. ch. 4,) is in force in this State, and its effect is to exclude conveyances and devises to such uses from the operation of the rule against perpetuities. (*Heuser v. Harris, supra*; *Crerar v. Williams*, 145 Ill. 625.) Though a private trust cannot be created in perpetuity, that rule has no application to a gift for charitable uses.

It is insisted, however, that there is no direct gift but only an authority to the executor to pay and convey to the proposed library association when the conditions as to incorporation and the provision of a fund have been complied with, and that where the gift itself is thus conditional it is subject to the same rules and principles as any other estate and if in violation of the rule against perpetuities must fail. This is not a correct view of the gift. Neither the organization of the corporation nor the provision of a fund is a condition precedent to the vesting of the gift. The gift itself is not conditional, but is an absolute and immediate devotion of the sum of \$10,000 to the purposes of the will in connection with the library. The language is: "For the purpose of aiding in the establishment and support of a public library in the village of Lexington, Illinois, * * * I direct, empower and authorize my executor to hold and apply the sum of \$10,000." This is a present direction to

hold that sum of money for the purpose indicated, and it takes effect at the same time as the will. The money is to be held from that time for that purpose and to be applied in the manner stated. The gift is not to the corporation to be created, but to the public. The corporation is a means for making the gift effective and not the donee for whose benefit it is given, and the gift will be upheld though the corporation may never be created. *Crerar v. Williams, supra; Ingraham v. Ingraham*, 169 Ill. 432.

In *Perry on Trusts* (vol. 2, sec. 736,) it is said, that "if a testator ties up his property for a term, by possibility, longer than a life or lives in being and twenty-one years and nine months, and then gives it over to a charity, the gift to the charity is void because of the perpetuity in the first taker. But a gift may be made to a charity not *in esse* at the time, to come into existence at some uncertain time in the future, provided there is no gift of the property in the first instance, or perpetuity in a prior taker." These statements are quoted with approval in the cases just cited, which hold that a gift in trust for a charity not in existence and the beginning of whose existence is uncertain, or which is to take effect upon a contingency which may not happen within a life or lives in being and twenty-one years, will be upheld, provided there is no gift of the property meanwhile to or for the benefit of any individual or any private corporation. To the same effect are *Odell v. Odell*, 10 Allen, 1, *Woodruff v. Marsh*, 63 Conn. 125, *Russell v. Allen*, 107 U. S. 163, and many other cases.

In *Almy v. Jones*, 17 R. I. 265, it is said that a trust for charitable uses may depend for its going into effect upon a condition to be performed by others which may or may not be performed within the period allowed. The bequest there held valid against the objection that it violated the rule against perpetuities was a gift of \$25,000 as a fund for an art institute in the city of Providence. When the citizens of Providence should have contributed the funds

necessary to found an institute worthy of the city for the promotion of art, then the sum, with accumulated interest, was directed to be permanently invested, the interest, only, to be used for the benefit of the institute for all time.

In *Webster v. Wiggin*, 19 R. I. 73, one-half the income of a fund was directed to be devoted to the payment of the salaries of additional teachers in the public schools of Providence, or, if the city refused to co-operate in this design, to the establishment of schools in accordance with certain regulations. The application of the income in either case was not to occur until the fund, with its accumulations, amounted to \$500,000, which might not occur within the time limited by the rule against perpetuities. It was held, however, that the rule had no application, the fund, in the meantime, being devoted to charity.

In *School Land Comrs. v. Wadhams*, 20 Ore. 274, a devise in trust for the benefit of the First Presbyterian Church of the town of Upper Astoria was held good though there was not any First Presbyterian Church, or any Presbyterian church organization, association or society, in Upper Astoria.

In *Jones v. Habersham*, 107 U. S. 174, a bequest "to the first Christian church erected or to be erected in the village of Telfairville, in Burk county, or to such persons as may become trustees of the same," was sustained.

The tenth clause of the will is a valid gift to a public charity.

The testatrix's husband having renounced the will, that part of the residuary clause which gave to him one-third of the residue of the estate became inoperative, and he became entitled, if he should so elect, to take one-half of all the real and personal estate after the payment of debts. In view of this, the court decreed that one-half the residue passed under the will to the Illinois Wesleyan University and one-half to be held for the purpose of the library. The provisions made by the will for the surviving husband be-

came inoperative when he renounced the will but all its other provisions remained in force. The amount of the residuary bequest to each residuary legatee is one-third of the amount of two-thirds of the estate, less the debts, the pecuniary legacies and the south-west quarter of the homestead, and each of the two, other than the husband, is entitled to receive this amount. If by reason of the renunciation of the will this amount is reduced below what it would otherwise be, the bequests to the two residuary legatees must be reduced equally but they cannot be increased.

It is argued that the renunciation of the provisions of the will by the husband does not cause the property bequeathed to him to become intestate but that it will pass under the residuary clause. This proposition is correct, and the one-third of the testatrix's property devised to her husband by his renunciation becomes, together with all the rest of the estate not otherwise disposed of, subject to the residuary clause of the will. This clause, however, gives to the husband himself one-third of the residuary estate. This one-third is not to be divided, as was done by the decree, between the other two residuary devisees. The share of the residuary estate bequeathed to each of the three residuary devisees is fixed by the will and is several. The will contains no provision for the disposition of the share of one which shall lapse for any reason.

Our attention is called to section 79 of chapter 3 of the Revised Statutes, which provides that in cases of the renunciation of a will and the consequent increase or diminution of legacies and bequests the loss or gain shall be equalized in a ratio corresponding to the amounts of such legacies or bequests. The effect of this section is not to change the devise of one-third of the residue to a devise of one-half the residue upon the renunciation of the will. If the effect of the renunciation is to increase the amount or value of the two-thirds devised to the remaining residuary devisees the increase will be divided between them; if

the effect is to diminish the amount or value they must divide the loss, but they are not entitled to receive any part of the one-third of the residue devised to the husband unless it is necessary to equalize the amount received with what it would have been had there been no renunciation. If the amount of the residuary estate is not diminished by reason of the renunciation and is not exhausted by the bequest to the Illinois Wesleyan University and the library, the remainder, under section 12 of the Statute of Descent, must be distributed in the same manner as the estate of an intestate. Neither the value of the estate nor the amount of the debts against it appears from the record. When the bill was filed and when the cause was heard the year for filing claims against the estate had not expired. It cannot, therefore, be known whether the effect of the renunciation was to diminish or increase the residuary estate. If the debts are just equal to one-third of the value of the estate the renunciation will not affect the residue, while if they exceed one-third the value of the estate the renunciation will increase the residue above what it would have been if the husband had taken under the will, and if they are less than one-third the value of the estate the renunciation will reduce the residue below what it would have been if the husband had taken under the will. Whether the residue is increased or diminished by the renunciation, the amount actually bequeathed by the will to the two remaining residuary legatees is not affected. It may be more or less than the half of the actual residue remaining when the estate is finally settled, and it was error for the court to decree one-half of such residue to the Illinois Wesleyan University and one-half to the library.

It is urged that the court erred in not finding that the appellant Charles Hopkins was related to the testatrix in the same degree on both her maternal and paternal sides. He was the son of her father's sister and her mother's brother. It was immaterial. He was her cousin, and the

degree of his relationship was not affected by the fact that it could be traced through two lines of descent. There could be no representation in this case.

Since by his renunciation of the will the husband of the testatrix has become entitled to one-half of the real estate, including the tract devised for the library, the decree should provide that in any division which may be made of the estate his interest shall be assigned out of property other than that so devised.

The decree is reversed and the cause remanded to the circuit court with directions to re-enter the decree, except that it shall be decreed that in any division of the real estate which may be made, the interest of Lewis S. Van-Dolah, the surviving husband, shall be assigned to him out of land other than the tract devised by the tenth paragraph of the will for a library, and that upon the final settlement of the estate the Illinois Wesleyan University will be entitled to receive an amount equal to one-third of the value of two-thirds of the estate, less the debts, costs, legacies and special devises, and that a like amount shall be held in trust for aiding in the establishment and support of a library, as provided in the tenth clause of the will, and that the cross-complainants shall be entitled, in equal shares, to whatever surplus there may be, and that if the residue of the estate, after the payment of the debts, costs, legacies and special devises, does not equal the amount to which the Illinois Wesleyan University and said library trust fund are found to be entitled, such residue be equally divided between them.

Reversed and remanded, with directions.

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, vs. ROBERT E. CANTWELL, Plaintiff in Error.

Opinion filed December 21, 1911—Rehearing denied Feb. 8, 1912.

ASSAULT AND BATTERY—*information need not allege, in terms, that assault was unlawfully made.* An information charging the defendant with assault and battery is not fatally defective though it does not allege, in terms, that the assault was unlawfully made.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on writ of error to the Municipal Court of Chicago; the Hon. STEPHEN A. FOSTER, Judge, presiding.

GEORGE W. PLUMMER, and JAMES T. BRADY, for plaintiff in error.

W. H. STEAD, Attorney General, JOHN E. W. WAYMAN, State's Attorney, and JOEL C. FITCH, (ZACH HOFHEIMER, of counsel,) for the People.

Mr. JUSTICE DUNN delivered the opinion of the court:

The plaintiff in error was convicted in the municipal court of Chicago of assault and battery. The Appellate Court having affirmed the judgment he has brought the record here for review, and contends that the information is not sufficient, that a reference to the defendant's right to testify entitled him to a new trial, and that the instructions were erroneous.

The objection made to the information is, that it does not allege that the assault was unlawfully made. The information is sufficient at common law and is equally good to charge a violation of the statute. 3 Chitty's Crim. Law, 821; Bishop's Directions and Forms, 99, sec. 201; *Curtis v. People*, Breese, 256; *State v. Bray*, 1 Mo. 180; *State v. Hays*, 41 Tex. 526.

The remark of the State's attorney which is complained of does not appear to have been either intended or calculated to direct the attention of the jury to the defendant's neglect to testify.

The objections to the instructions are too refined and tenuous to be of practical importance.

Judgment affirmed.

M. E. SLICK, Appellee, vs. ELIZABETH BROOKS, Appellant.

Opinion filed December 21, 1911—Rehearing denied Feb. 9, 1912.

1. NAMES—*middle initial is no part of name.* A middle initial is no part of a name, and it will be presumed, after a lapse of many years and in the absence of proof to the contrary, that the person who attested a will as "David D. Malone" was the same person who testified as "D. M. Malone" at the time the will was admitted to probate in the county court.

2. WILLS—*probate of a will cannot be attacked in a collateral proceeding.* The probate of a will cannot be attacked in a collateral proceeding brought for the purpose of obtaining a construction of the will.

3. SAME—*language used to cut down fee to life estate must be clear and unequivocal.* While a fee may be cut down by subsequent language used in the will, yet the language so relied upon must be clear and unequivocal.

4. SAME—*when fee is not reduced to life estate by subsequent language.* Where the first clause of a will gives all the testator's real estate to his wife, the second clause gives her all his personal property, and the last clause gives her all the rest and residue of the property, revokes former wills and appoints the wife executrix, concluding with the words, "so long as she remains my widdo," such words do not reduce the widow's fee to a life estate.

APPEAL from the Circuit Court of DeWitt county; the Hon. W. G. COCHRAN, Judge, presiding.

E. J. SWEENEY, and E. B. MITCHELL, for appellant.

INGHAM & INGHAM, and HERRICK & HERRICK, for appellee.

Mr. JUSTICE HAND delivered the opinion of the court:

It appears from the pleadings and proofs that Samuel Slick departed this life on April 16, 1873, seized of the east half of the south-east quarter of section 35, township 31, north, range 4, east of the third principal meridian, in DeWitt county, leaving him surviving Margaret A. Slick as his widow, and the following named persons as his children and sole heirs-at-law: J. W. Slick, J. G. Slick, Eliza Slick, (now Eliza Wisenberger,) R. M. Slick, Geo. Slick, L. E. Slick and Elizabeth Slick (now Elizabeth Brooks;) that the following instrument in writing was admitted to probate on May 19, 1873, in the county court of DeWitt county, as his last will and testament:

"First—I give and bequeath to my wife, Margret A. Slick all my real estate situated, lying and being in the county and State aforesaid.

"Second—I give and bequeath to my wife, Margret A. Slick all my personal property of all description—after paying all outstanding debtes against my estate. I also appoint my wife Margret A. Slick guardian of my heirs with full power of controlling ther affars while they ar in ther minority.

"And lastly, I give and bequeath all the rest residue and remainder of my personal estate goods and chattels of what nature or kind soever to my said wife Margret A. Slick whom I hereby appoint sole executrix of this my last will and testament hereby revoking all former wills by me made so long as my wife Margret A. Slick remains my widdo."

Margaret A. Slick qualified as executrix, and in the year 1875 she filed a report showing the settlement of the estate and was discharged as executrix. She lived upon said land until the year 1908, when she died intestate, leaving said seven children her surviving as her sole heirs-at-law. The appellee, M. E. Slick, is the wife of L. E. Slick, one of the sons of Margaret and Samuel Slick. Soon after the settlement of the estate of Samuel Slick the children of

Samuel Slick, with the exception of Elizabeth Brooks, conveyed their interest in said land to their mother, Margaret A. Slick, under the belief that they were the owners in fee of said real estate and that their mother held only a life estate therein, and thereafter Margaret A. Slick conveyed six-sevenths of said land to the appellee, M. E. Slick, so that at the time of the death of Margaret A. Slick the appellee was seized of the undivided six-sevenths of the said land, and the title to the other undivided one-seventh of said land either rested in appellant, Elizabeth Brooks, as heir or devisee of Samuel Slick, deceased, or in Margaret A. Slick, and descended in equal parts to her seven children. After the death of Margaret A. Slick this litigation was commenced for the partition of said land.

The sole question here to be determined is, is Elizabeth Brooks the owner of the undivided one-seventh part of said land as heir or devisee of Samuel Slick, deceased, or the owner of one forty-ninth part of said lands as heir of Margaret A. Slick?

It is first contended that the will of Samuel Slick was not duly probated, as it appears from the county court record admitting the will to probate, introduced in evidence in this case, that the will was attested by Peter Brickey and David D. Malone, while the will was proven in the county court by the testimony of Peter Brickey and D. M. Malone, and it is urged if the will was not properly proven, then the real estate was intestate property and Elizabeth Brooks inherited one-seventh thereof from her said father, Samuel Slick. The probate of a will cannot be attacked in a collateral proceeding; (*Bowen v. Allen*, 113 Ill. 53; *Chicago Title and Trust Co. v. Brown*, 183 id. 42; *Davis v. Upson*, 209 id. 206;) and if it could be so attacked, it does not appear from the county court record that the will was not properly admitted to probate by the county court of DeWitt county, as the middle letter of a name is no part of the name, and after the elapse of thirty-five years, in the ab-

sence of proof to the contrary, the presumption would obtain that the David Malone who attested the will was the same person who made proof of its execution as D. Malone at the time it was admitted to probate in the county court. We are of the opinion the will of Samuel Slick was shown to have been duly admitted to probate by the record of the county court introduced in evidence and that Samuel Slick died testate.

It is next contended that if the will of Samuel Slick is held to have been properly admitted to probate, Margaret A. Slick took a life estate, only, in said lands, and that one-seventh thereof was devised in fee to the appellant, and that she is entitled to take one-seventh thereof under the will of Samuel Slick, deceased. The first paragraph of the will gives the land of the testator located in DeWitt county in fee to his widow, Margaret A. Slick. The second paragraph gives Margaret A. Slick all his personal property and appoints her guardian of his minor children, and the third paragraph gives all the rest and residue of his personal property to Margaret A. Slick, names her as executrix of his will, revokes all former wills, and then concludes, "so long as my wife Margret A. Slick remains my widdo." The evidence shows the will was drafted by a neighbor—a farmer—who was not skilled in drafting wills, and the appellant testified, over objection, that she was present at the time the will was drafted and that her father stated to the scrivener that he wanted to give all his property to his widow as long as she should live; that her mother said she ought to have it no longer than she remained his widow, and that the scrivener then wrote in the words at the close of the will, "so long as my wife Margret A. Slick remains my widdo." There can be no question but that Margaret A. Slick was given the fee to the DeWitt county lands of the testator by the first paragraph of the will, unless the estate granted to her by that paragraph was cut down to a life estate by the subsequent language of the will here-

inbefore quoted. While a fee may be cut down to a life estate in a will, still when a fee is granted and subsequent language is relied upon to limit the fee, the language used to reduce the fee must be clear and unequivocal. (*Wicker v. Ray*, 118 Ill. 472; *Fishback v. Joesting*, 183 id. 463; *Kohtz v. Eldred*, 208 id. 60.) In *Roberts v. Roberts*, 140 Ill. 345, it was said, on page 349: "The rule of construction is, that where an estate is given by one clause or part of a will it cannot be cut down or taken away by a subsequent clause except by clear and unambiguous terms, and it is sometimes said that in order to give the latter clause that effect, its language must be as clear as that of the clause giving the estate." The words, "so long as my wife Margaret A. Slick remains my widdo," are found in the last paragraph of the will, and if they have any significance whatever, clearly refer to the property referred to in that paragraph of the will or to the time Margaret A. Slick should act as his executrix, and do not refer to the real estate in DeWitt county which had by the first paragraph of the will been devised in fee to the widow. We do not think, therefore, it can be said that the clear and specific terms of the first paragraph of the will are limited by the words found in the last paragraph, which are ambiguous and uncertain in meaning, and the oral testimony of the appellant, if competent for any purpose, could not be received to change the clear and unambiguous language of the will; neither can the fact that the beneficiaries under the will proceeded for a time under the mistaken belief that Margaret A. Slick only took a life estate in said land.

The circuit court did not err in decreeing that the appellant was the owner of the one forty-ninth part of said land.

The decree of the circuit court will be affirmed.

Decree affirmed.

EDWIN M. CLARK vs. ROBERT ZALESKI *et al.*—(WILLIS V. ELLIOTT *et al.* Appellants, vs. EDWIN M. CLARK *et al.* Appellees.)

Opinion filed December 21, 1911—Rehearing denied Feb. 9, 1912.

1. TAXES—*redemption referred to in section 253 of the Revenue act means the redemption contemplated by section 210.* The right of redemption from a sale under a decree foreclosing a lien for taxes under section 253 of the Revenue act means the right to redeem at any time within two years from the sale, as provided in section 210 of said act and section 5 of article 9 of the constitution, and does not mean the right of redemption allowed from sales made under ordinary decrees in chancery.

2. SAME—*section 253 of Revenue law contemplates compliance with section 216 of said law.* Section 253 of the Revenue law, authorizing the foreclosure of a lien for taxes, contemplates and requires that a purchaser under the decree, before he is entitled to a deed, shall comply with section 216 of the Revenue law, relating to ordinary tax sales, by giving notice, as therein required, to all interested parties, which includes all the different classes of persons entitled to notice under said section.

3. SAME—*purpose of section 217 of Revenue law.* The purpose of section 217 of the Revenue law, requiring the purchaser at an ordinary tax sale, or his agent, to file an affidavit showing compliance with the requirements of section 216 of said law, is to furnish record evidence of certain facts which without such affidavit would rest only in the memory of witnesses, and to furnish the officer who is required to issue the deed with a basis for his action, and in case of an ordinary tax sale a deed cannot issue until such affidavit is filed.

4. SAME—*section 217 of Revenue act does not apply to a sale under a decree foreclosing tax lien.* Section 217 of the Revenue law, requiring the purchaser at an ordinary tax sale to file an affidavit showing compliance with the requirements of section 216 of said law, does not apply to a sale made under a decree foreclosing a tax lien, and in such case it is not necessary to file an affidavit showing a compliance with said section 216 before the county clerk is authorized to issue a deed after he has been ordered to do so by a court having jurisdiction to make such order.

5. SAME—*section 253 contemplates that evidence of all steps may be preserved in record of foreclosure proceeding.* It is within the contemplation of section 253 of the Revenue law that when a court of equity has acquired jurisdiction for the purpose of

foreclosing a tax lien it may retain such jurisdiction until the entire matter is consummated, and that the evidence of all the steps taken, up to the issuing of the deed, may be properly preserved in the records of the court where the proceeding is had.

6. *SAME—court of equity does not lose jurisdiction by entering decree foreclosing tax lien.* While a decree foreclosing a tax lien is final in the sense that it may be reviewed by appeal or writ of error, yet the court does not thereby lose all jurisdiction, and it has power to make all other orders necessary to carry the foreclosure decree into effect without compelling the parties to resort to another action.

7. *SAME—finding of court that provisions of section 216 have been complied with is not without jurisdiction.* Where there is a foreclosure of a tax lien it is proper for the purchaser to present to the court wherein the proceeding was had, evidence of his compliance with the law and the decree and obtain a finding of record of such compliance and that he is entitled to a deed and secure an order that the deed shall issue, and even though such findings may not be essential to the validity of the purchaser's title, they are within the jurisdiction of the court and are binding upon all the parties in a collateral proceeding.

8. *SAME—effect of foreclosure of tax lien.* Where a tax lien is foreclosed and a sale is had in pursuance of a valid decree and the purchaser complies with the law in regard to giving notice, the proceeding constitutes a new and independent title, free and clear from all previous titles and claims of every kind and character, as the statute provides that the taxes on real estate shall be a prior and first lien on such property, superior to all other liens and encumbrances.

9. *SAME—tax deeds held by parties of record are cut off by decree foreclosing tax lien.* Tax deeds held by a party to a suit to foreclose a tax lien who did not set up his interest and have it adjudicated in that proceeding are cut off by the foreclosure decree and sale thereunder, and the purchasers at such sale to whom deeds are issued are entitled to a partition of the land without reimbursing such holder for the amount he has expended.

10. *LIS PENDENS—a person acquiring interest after commencement of suit is bound by decree.* One who acquires an interest in land from the holder of a tax deed after the commencement of a suit to foreclose a tax lien and after service of summons upon such holder is bound by the final decree though not made a formal party to the record.

11. *COLLATERAL ATTACK—decree foreclosing tax lien is within the rule concerning collateral attack.* The rule that a decree can

not be attacked in a collateral proceeding except upon the ground of want of jurisdiction applies to a decree foreclosing a tax lien the same as to other foreclosure decrees, and a partition suit by the purchasers at such foreclosure sale is collateral to the foreclosure proceeding.

APPEAL from the Superior Court of Cook county; the Hon. MARTIN M. GRIDLEY, Judge, presiding.

JOHN R. O'CONNOR, MARVIN E. BARNHART, and WILLIAM GARNETT, for appellants.

ENOCH J. PRICE, JOHN S. BROWN, and SHERMAN C. SPITZER, (CHARLES L. BARTLETT, of counsel,) for appellees.

Mr. JUSTICE VICKERS delivered the opinion of the court:

This is an appeal by Jacob Glos, August A. Timke, Willis V. Elliott and William Shillaber, Jr., in his own right and as trustee, from a decree of the superior court of Cook county finding the interests of the parties, granting partition among them and appointing commissioners, rendered on a bill for the partition of fifty-three lots in the city of Chicago, wherein Edwin M. Clark was complainant and Robert Zaleski and others were defendants. The decree found that Clark and Zaleski were the owners in fee simple, in equal parts, of the premises sought to be partitioned. The errors assigned question the correctness of the finding in respect to the title of Clark and Zaleski.

The title of appellees, Clark and Zaleski, was obtained by conveyance from B. H. Collier and S. B. Tefft, whose claim of title was obtained under a sale and deed made in pursuance of a decree entered in the circuit court of Cook county in a proceeding to foreclose a tax lien in favor of the People of the State of Illinois for forfeited taxes on the premises in question, under section 253 of the Revenue act. The principal controversy between the parties relates to the validity of the proceeding to foreclose the tax lien.

Appellants contend that the decree granting a foreclosure of the tax lien is void for the want of jurisdiction and that the deed based thereon conveyed no title. Appellees contend that the court had jurisdiction both of the subject matter and of the parties, and that the title obtained under its decree is not open to question in a collateral proceeding, however erroneous such decree may be. Since the whole controversy depends upon the validity of the foreclosure proceeding, it will be necessary to state the history of that proceeding somewhat in detail.

It appears from the bill filed in the foreclosure proceeding that in 1891 Arthur S. Rundall was the owner in fee, except railroad right of way of the Chicago, Milwaukee and St. Paul Railroad Company, of the south-west quarter of the north-east quarter of the south-west quarter of section 35, township 40, north, range 13, east of the third principal meridian, in Cook county, Illinois; that said Rundall derived title to said premises by a regular chain of conveyances from the United States government; that said premises were at that time subject to certain trust deeds to the Northern Trust Company, and that the said Rundall, on December 2, 1891, platted the said premises into a subdivision known and described as J. R. Lane's subdivision. All of the lots involved in this suit are in said subdivision. The bill alleges that by certain conveyances Willis V. Elliott, on August 4, 1906, became the owner of twenty-three of said lots, being lots 1 to 6, 57 to 66 and 84 to 90, and that on November 20, 1905, William Shillaber, Jr., held title to thirty of said lots, being lots 10 to 13, 45 to 50, 52 to 54 and 67 to 83. It is alleged that from time to time said lots were sold to Jacob Glos for delinquent taxes and that numerous tax deeds were issued to said Glos covering all of the lots in question, and that other tax sales were made of the said premises and deeds issued thereon to the city of Chicago. These several tax sales were made at various times between September 1, 1893, down to Octo-

ber 5, 1905. The bill to foreclose the tax lien alleges that all of the above described lots were duly forfeited to the State of Illinois for the unpaid general taxes levied thereon for the years from 1900 to and including 1903. The aggregate amount of taxes, interest and penalties due at the time the bill was filed was \$2588.54. On April 7, 1905, a bill was filed in the circuit court of Cook county to foreclose the statutory lien against Lynden Evans, James R. Lane, Herbert L. Bailey, Arthur S. Rundall, John Lewis, William Shillaber, Jr., Jacob Glos, Eugene H. Fishburn, the Northern Trust Company, the unknown owners of the notes described in the trust deeds to said Eugene H. Fishburn, the Northern Trust Company, and all unknown owners of the premises in question. All of the defendants to the said foreclosure proceeding were served, either by personal service of summons or by publication and mailing of notice, in accordance with the usual chancery practice. Jacob Glos, Lynden Evans, William Shillaber, Jr., and Eugene H. Fishburn personally appeared by their respective solicitors and filed answers in said proceeding. All other defendants failing to appear were defaulted. The answer of Lynden Evans alleged that he was the owner of thirty of said lots in fee, by quit-claim deeds from Arthur S. Rundall and James R. Lane; and the answer of William Shillaber, Jr., as trustee under the last will of Jason Rogers, deceased, averred that he was the owner of one of the notes of \$5250 described in and secured by the trust deed to the Northern Trust Company. Fishburn's answer denied all of the allegations of the bill and asked for strict proof. Jacob Glos answered the bill, and stated that he was not informed as to the truth of any of the allegations of the said bill, "except said allegation that this defendant claims some interest in the premises described therein, and as to said last mentioned allegation this defendant admits the same, but denies that his interest in said premises was or is subject to the lien of complainant." Replications having

been filed to the several answers, the cause was referred to the master. The master took the testimony and made a report finding in favor of the complainant, and recommended a decree of foreclosure for the tax lien in accordance with the prayer of the bill. To the master's report appellant Glos filed numerous objections, all of which were overruled by the master.

On October 11, 1905, the foreclosure proceeding came on for final hearing before the court upon the bill, answers thereto and replications, and the master's report and the objections thereto, and the court made and entered a final decree of foreclosure in the cause, finding that the court had jurisdiction of the subject matter of the suit and of all the parties thereto and that the allegations of the bill were true, and specifically finding that the premises in question had been duly forfeited for unpaid taxes, as set out in the bill, and found the amount due to be \$2539.07, and ordered and adjudged that unless the defendants to said proceeding, or some of them, paid said amount so found due within three days thereafter, said real estate be sold by the county treasurer of said Cook county to the highest and best bidder for cash, at his office in Chicago. The decree required that the sale should be upon notice published for three successive weeks, and that the county clerk should attend said sale and make, execute and deliver to the purchaser a certificate or certificates of sale, and that the county treasurer should make a report to said court of said sale and bring the proceeds thereof into court to abide further order. By said decree it was, among other things, further "ordered, adjudged and decreed that upon the expiration of two years from and after the date of said sale, if the premises so sold shall not be redeemed according to law, the defendants, and all persons claiming under them or any of them since the commencement of this suit, be forever barred and foreclosed of any and all rights and equity of redemption or claim of, in or to said premises or any part thereof, and in

case said premises shall not be redeemed, as aforesaid, then, upon the production to the then acting county clerk of said county of Cook, Illinois, of said certificate or certificates of sale by the legal holder thereof, said county clerk shall execute and deliver to the legal holder of said certificate or certificates a good and sufficient deed of conveyance of said premises, in conformity with the statute in such case made and provided, and that thereupon the grantee or grantees in such deed, or his or their legal representatives or assigns, be let into possession of said premises or any portion thereof, and any persons who may have come into possession under the defendants, or any of them, since the commencement of this suit, shall, upon the production of said deed of conveyance and a certified copy of the order of court confirming said sale, surrender possession of said premises to said grantee or grantees, his or their representatives or assigns, and in default of so doing a writ of assistance may issue herein, in accordance with the practice of this court." Appellant Glos prayed and was allowed an appeal from said decree but never perfected the same.

In pursuance of this decree John R. Thompson, county treasurer and collector of Cook county, duly advertised said premises for sale on December 8, 1906, by publication, for four successive weeks, of notice of such sale in the *Chicago Law Journal Weekly* and sold the same to Walter Langlois for \$2050, and on December 14, 1906, made a detailed report of said sale to the circuit court, showing that he had sold said lots to said Langlois for \$2050, "there being no bidder for said lots separately or in any combination less than the whole." Said report showed that the county treasurer had issued to said Langlois a certificate of sale, as directed by the decree, and that the money arising from said sale was brought into court by said treasurer. On the day said report was filed an order was made by the court approving and confirming said sale and ordering the proceeds distributed among the various officers entitled thereto.

On December 9, 1906, Walter Langlois, by endorsement in writing on the back of the certificate of sale, assigned the same to B. H. Collier and S. B. Tefft. The sale having occurred on December 8, 1906, the time of redemption expired, under the decree and under the law, December 8, 1908. Within less than five and more than three months before the time of redemption expired, Collier and Tefft caused notices to be served personally upon all persons who were defendants in the foreclosure proceeding, and caused a notice of said tax sale to be published in the *Inter-Ocean* on the third, fourth and fifth days of September, addressed to "unknown owners" and "parties interested," in addition to naming all of the persons who were defendants of record in the foreclosure proceeding, which said notices stated when the premises were sold, a description of the property sold, the years for which said premises were taxed and that said premises were not assessed in the name of any person, and when the time of redemption would expire. On October 16, 1909, being less than one year after the time of redemption had expired, the assignees of the certificate of purchase (Collier and Tefft) filed a petition in the circuit court entitled the same as the foreclosure proceeding, in which all of the preceding steps in the foreclosure proceeding were recited, and averred that the petitioners had duly published and caused to be served notices of the sale and of the expiration of the time of redemption therefrom, and prayed that the court might investigate and consider the matters and things set forth and find that petitioners had in all respects complied with the law and the decree of the court, and that the county clerk be ordered to execute and deliver to petitioners a deed vesting in petitioners, in equal parts, as tenants in common, the title in fee simple to said premises, and that the court might approve a deed of conveyance, a copy of which was submitted with the petition for the inspection and approval of the court. With the said petition were filed affidavits of

Andrew M. Strong, Clarence A. Lawson, John Zahn and M. B. Danaher, which were made a part of said petition. The affidavits attached to said petition were made by the persons who, as agents of Collier and Tefft, had served the notices of the sale, and contained a detailed statement of what each person had done in respect to serving the notices, and copies of the notices served were set out at length in the affidavits. Filed with said petition was a notice, duly entitled in said foreclosure proceeding, dated October 15, 1909, signed by said Collier and Tefft and addressed to the solicitors of record of all parties in interest, notifying them that on October 16, 1909, at the opening of court on the morning of that day, or as soon thereafter as counsel could be heard, the said Collier and Tefft would appear before his honor Judge Petit, in the court room usually occupied by him in Cook county, and present their petition for a deed upon the certificate of sale theretofore issued to Walter Langlois, and would offer affidavits and other proof in support of said petition and ask for a decree upon said petition, and notifying said parties that they could be present at the time and place named, if they so desired. As to some of the parties service of this notice was acknowledged by a receipt for a copy signed by their counsel, and as to others an affidavit of service was presented showing service by leaving copies at the office or place of business of the parties named, with some person over the age of fifteen years, in charge of the business or connected with the person for whom the notice was intended.

Upon the presentation and hearing of said petition a supplemental decree was entered by the circuit court in the said foreclosure proceeding, in which said decree it was recited that said cause came on to be heard upon the petition and affidavits attached thereto and upon testimony, proofs and exhibits offered and heard in open court, and upon argument of counsel for the respective parties the court found "that it had jurisdiction of the subject matter

herein and of all the parties thereto; that all parties to this cause have had due notice of the presentation of and hearing upon said petition and that all material allegations in said petition contained are true and proven as therein set forth." In and by said supplemental decree the court further found all of the above mentioned facts in reference to the sale of said lots, the issuance and assignment of the certificate of sale, the ownership of said lots and the several claims made thereto, the service of publication notices to redeem, and the failure to redeem from said sale,—all of which said findings were made as set forth in said petition. And the court further found in said decree "that said B. H. Collier and S. B. Tefft have duly complied with all of the requirements of the constitution and laws of Illinois in regard to the issuance of tax deeds upon sales in tax forfeiture proceedings and have also complied with the terms and conditions of the decree heretofore entered herein, and that they are entitled to have issued to them a deed of conveyance vesting in them, in equal parts, as tenants in common, the title to said above described premises and every part thereof." The decree also ordered and directed the county clerk to issue to said Collier and Tefft a deed, a copy of which was presented to and approved by the court, conveying to said petitioners, as tenants in common, all of the premises described in the foreclosure proceeding. No appeal has ever been prosecuted either from the original decree of foreclosure or from the supplemental decree of October 16, 1909, and said decrees still remain in full force and effect.

On the 16th day of October said Collier and Tefft surrendered to Joseph F. Haas, county clerk of Cook county, the certificate of purchase and received a deed from said clerk for said premises. On October 23, 1909, Collier and wife, in consideration of \$2500, sold and conveyed Collier's undivided one-half of the premises in question to the appellee Edwin M. Clark, and on April 20, 1910, the said

S. B. Tefft, in consideration of \$2000, sold and conveyed her undivided one-half of the premises in question to appellee Robert Zaleski. Under these proceedings appellees Clark and Zaleski claim to be the owners in fee of the premises and entitled to a partition thereof between themselves, and that all right, title or interest of appellants is barred and forever foreclosed by the decree of foreclosure and supplemental decrees made thereafter.

Appellants contend that all of the requirements of law in relation to the sale of real estate for the non-payment of taxes apply as well to sales made under a decree foreclosing a tax lien as to ordinary sales made by the collector of taxes in pursuance of a judgment of the county court; that the requirements of the law were not complied with in this case, and that the supplemental decree of October 16, 1909, finding that the statute had been complied with in all respects, is void for the want of jurisdiction and not binding upon appellants in this or any other proceeding, and that, these propositions being established, the appellees' title under the foreclosure proceeding is to be regarded merely as an ordinary tax title derived through a collector's sale, and is open to all of the objections that might be interposed to such title.

Sections 4 and 5 of article 9 of the constitution of 1870 are as follows:

"Sec. 4. The General Assembly shall provide, in all cases where it may be necessary to sell real estate for the non-payment of taxes or special assessments for State, county, municipal or other purposes, that a return of such unpaid taxes or assessments shall be made to some general officer of the county having authority to receive State and county taxes; and there shall be no sale of said property for any of said taxes or assessments but by said officer, upon the order or judgment of some court of record.

"Sec. 5. The right of redemption from all sales of real estate for the non-payment of taxes or special assessments

of any character whatever, shall exist in favor of owners and persons interested in such real estate, for a period of not less than two years from such sales thereof. And the General Assembly shall provide by law for reasonable notice to be given to the owners or parties interested, by publication or otherwise, of the fact of the sale of the property for such taxes or assessments, and when the time of redemption shall expire: *Provided*, that occupants shall in all cases be served with personal notice before the time of redemption expires."

To carry out the above constitutional provisions the legislature has imposed conditions, by section 216 of the Revenue law, with which the purchaser of real estate for delinquent taxes must comply before he will be entitled to a deed. These conditions relate mainly to the matter of serving notices upon various persons, such as the person in possession of the premises, the owner or parties interested, the person in whose name the property was taxed, and all other persons interested who may upon diligent inquiry be found in the county, and the section provides, under certain conditions, for a service of notice by publication. In the case of an ordinary sale of real estate for a delinquent tax a strict compliance with all of the requirements of section 216 must be shown or a tax deed issued in pursuance of such sale will be declared void. Section 217 of the Revenue law provides that every such purchaser or his assignee, either by himself or agent, shall, before he shall be entitled to a deed, make an affidavit of his having complied with the conditions of section 216, stating particularly the facts relied on as such compliance, and deliver such affidavit to the person authorized by law to execute such tax deed, and provides that said affidavit shall be *prima facie* evidence that the required notices have been given. Said section provides that false swearing in such affidavit shall be deemed perjury and punished accordingly. There was no attempt on the part of appellees to comply with section 217 by filing

an affidavit with the county clerk before the deed under which they claim was issued. If that section of the Revenue law applies to a foreclosure sale for forfeited taxes made in pursuance of section 253 of the Revenue law, and appellants are in a position to raise that question, the decree for partition is erroneous and will have to be reversed because appellees, Clark and Zaleski, are not the owners in fee of the premises.

Section 253 of the Revenue law, under which the foreclosure proceeding was had, is as follows: "The taxes upon real property, together with all penalties, interests and costs, that may accrue thereon, shall be a prior and first lien on such real property, superior to all other liens and encumbrances, from and including the first day of May in the year in which the taxes are levied until the same are paid; which lien may be foreclosed in equity in any court of competent jurisdiction in the name of the People of the State of Illinois, whenever the taxes for two or more years, upon the same description of property, shall have been forfeited to the State, and may be sold under the order of the court by the person having authority to receive State and county taxes, with the same notice to interested parties and right of redemption from said sale, as is now provided by law, and in conformity with sections four (4) and five (5) of article 9 of the constitution of this State."

So far as we are advised, no case has heretofore been decided by this court giving a construction to the provision in section 253 that real estate may be sold under a decree of foreclosure for forfeited taxes, "with the same notice to interested parties and right of redemption from said sale, as is now provided by law, and in conformity with sections 4 and 5 of article 9 of the constitution of this State." Appellants contend that the language in regard to notice to interested parties and right of redemption from the sale "*as is now provided by law,*" refers to the provisions in section 216 of the Revenue law and by clear im-

plication includes section 217, which requires the filing of an affidavit before a deed can be issued. Appellees contend that the language above quoted may with propriety be held to refer to those provisions of the Chancery act relating to notice and redemption from sales made under decrees in other chancery proceedings.

Section 253, as originally passed in 1872, merely provided that taxes assessed upon real property should be a lien thereon from and including the first day of May in the year in which they are levied, until the same are paid. (Rev. Stat. 1874, p. 899.) Under this statute providing for a lien on real estate for taxes a bill in equity was filed in the Madison county circuit court to foreclose a lien for \$9000 of taxes on lands that had been forfeited to the State. A demurrer was sustained to the bill and the bill dismissed. The case came to this court and was decided at the November term, 1880. The decree dismissing the bill was affirmed. (*People v. Biggins*, 96 Ill. 481.) This court there held that the lien given by section 253 was purely statutory and could only be enforced in the modes provided by the statute, and that a court of equity had no jurisdiction to foreclose the lien. In concluding the discussion of that case, this court, speaking by Mr. Justice Craig, on page 486, said: "If our Revenue law is defective, it is the duty and business of the legislature to amend it. Courts are powerless to interfere. They cannot make, but can only construe, laws after they are made by the legislature. If it is wise and proper that our revenue should be collected by bill in chancery, which we by no means concede, then the legislature should confer the jurisdiction upon that court, but until that is done we perceive no ground upon which we can hold that resort can be had to that tribunal." At the next session of the legislature after the decision in the *Biggins* case section 253 was amended so as to provide, as said section now does, for the foreclosure of such tax lien in equity. (Laws of 1881, p. 130.) After the section

was amended another bill was filed against Biggins, and a decree foreclosing the lien was affirmed by this court in *Biggins v. People*, 106 Ill. 270.

Section 216, substantially in its present form, was enacted in 1872 and was a part of the Revenue law when section 253 was amended, in 1881, and may therefore have been what the legislature had in mind when it provided in section 253 for the sale of lands under an order of court, "with the same notice to interested parties and right of redemption from said sale, *as is now provided by law.*" It will be noted that the provision in said section for "notice to interested parties" is connected by the conjunction "and" with the "right of redemption from said sale, as is now provided by law," which is followed immediately by the words, "and in conformity with sections 4 and 5 of article 9 of the constitution of this State." By reference to sections 4 and 5 of article 9 of the constitution it will be seen that the right of redemption from tax sales exists for two years from the date of sale. Section 210 of the Revenue law of 1872 provided that real property sold under the provisions of that act might be redeemed at any time before the expiration of two years from date of sale. The right of redemption for two years being a constitutional right, it cannot be inferred that the legislature intended to make an unconstitutional attempt to shorten the period of redemption, by section 253, to the fifteen months allowed for the redemption of real estate sold under other decrees in chancery in pursuance of the Chancery act. We must therefore hold that the "redemption" referred to in the amendatory act of 1881 was the right of redemption secured by section 210 of the Revenue act and section 5 of article 9 of the constitution. If the right of redemption referred to in section 253 is the constitutional and statutory right to redeem within two years from the date of sale, then it is a fair and reasonable inference that the "notice to interested parties" refers to the notice required by sec-

tion 216 of the Revenue law, and not the notice required under the Chancery act. The notices required by section 216 of the Revenue law must be given not less than three months nor more than five months before the time of redemption expires. The object of the notice is to give all persons having a right to redeem an opportunity to do so. In our opinion the provision for "notice to interested parties" and "right of redemption" as "is now provided by law," in section 253, refers to the Revenue law and not to sales made under any other law.

It follows from what has been said, that section 253 contemplates and requires that a purchaser under a decree foreclosing a tax lien shall, before he is entitled to a deed, comply with section 216 of the Revenue law in regard to giving notice. We are also of the opinion that the words "interested parties," in section 253, are used in a general sense, and include all of the different classes of persons who are entitled to notice under section 216. Section 216 was manifestly enacted in the interest of the owners and other persons interested in real estate which was sold for taxes, and is intended to afford such persons every opportunity to redeem from said tax sales and thus save a sacrifice of their property for a nominal sum. Section 217 of the Revenue law, which requires the purchaser or his agent to file an affidavit with the person authorized by law to execute such tax deed, differs in several respects from section 216. This section has nothing to do with the land owner's right to redeem. The affidavit is not made until after the time for redemption has expired. The primary object of section 217 is to make record evidence of certain facts which without such affidavit would rest only in the memory of witnesses. The affidavit is also designed to furnish the county clerk or officer who is required to issue the deed with a basis for his action. The duty to issue the deed does not arise and cannot legally be exercised under an ordinary tax sale until the affidavit is filed. The language of

section 217, "every such purchaser or his assignee," etc., refers to persons who might become purchasers at the ordinary tax sale under the law as it existed prior to the amendment of section 253. As we have already attempted to show, a court of equity had no jurisdiction to order a sale until section 253 was amended, so the words "every such purchaser," enacted in 1872, do not necessarily include purchasers at foreclosure sales in equity, which were not authorized until section 253 was amended, in 1881. There is nothing in the language of section 253 which can be construed as requiring a compliance with section 217. The legislature manifestly contemplated that when a court of equity acquired jurisdiction for the purpose of foreclosing a tax lien it would retain such jurisdiction until the entire matter was consummated, and that the evidence of all the steps taken, up to the issuing of the deed, would be properly preserved in the records of the court wherein such proceeding was being had, and that there was therefore no necessity for requiring an affidavit to be filed with the person authorized to issue the deed, thus leaving the record of the foreclosure proceeding incomplete, and making it necessary to supplement such proceeding by proof that an affidavit was filed with the county clerk. Our conclusion on this point is, that section 217 of the Revenue law has no application whatever to a sale made under a decree foreclosing a tax lien, and that in such case it is not necessary to file an affidavit showing a compliance with section 216 before the clerk is authorized to issue a deed after he has been ordered to do so by the decree of the court having jurisdiction to make such order.

Appellants contend that the decree of October 16, 1909, finding that the appellees, Clark and Zaleski, had complied with all of the requirements of section 216 and that they were entitled to a deed vesting them with the fee simple title, is void for the want of jurisdiction and is therefore open to collateral attack; that such finding is not binding

upon anyone, and that the question whether appellees had so complied with section 216 is open for determination in this proceeding. Upon this assumption appellants point out several matters in respect to which they claim the statute was not complied with. Appellants' argument on this point is, that the original decree foreclosing the lien and ordering a sale of the premises became final when the term at which such decree was rendered adjourned, and that, even if the court had jurisdiction in the first instance, the jurisdiction ended with the adjournment of the term at which such final decree was rendered, and that before the court would be authorized to again take jurisdiction of said cause it would be necessary to commence an original proceeding and again summon the parties before the court in the same manner in which they were brought before the court in the first instance. That the foreclosure decree was final in the sense that it might have been reviewed by appeal or writ of error we have no doubt, but we cannot lend our assent to the claim that the court lost jurisdiction, for all purposes, of said cause when the decree foreclosing the tax lien was rendered. While the lien upon real estate for taxes, as well as the jurisdiction of equity to foreclose the same, exists only by virtue of the statute, it would be a very narrow and strict construction to hold that the power of a court of equity was limited to the single act of entering a decree foreclosing such lien. The jurisdiction to foreclose the lien necessarily implies jurisdiction to make all other orders and decrees necessary to fully carry into effect the jurisdiction granted. Such, in effect, was the holding of this court in *Hammond v. People*, 178 Ill. 503. In that case an appeal was prosecuted from an order approving a deed and an order directing possession of the premises sold to be delivered to the purchaser in a proceeding to foreclose a tax lien under section 253 of the Revenue act. This court, on page 504, said: "So long as the proceeding is pending before a court of chancery that court has juris-

diction and power to approve a deed made under such decree, and to carry out its decree by placing the purchaser in possession where there has been proper notice and demand for possession. Under a judicial sale, where a *bona fide* purchaser has been guilty of no fraud or collusion in the procurement of the decree or in a sale thereunder but purchases in good faith for value, he cannot be disturbed or divested of his title because of error in the decree under which the sale was made,"—citing *Wadhams v. Gay*, 73 Ill. 415, *Sibert v. Thorp*, 77 id. 43, and *Swift v. Yanaway*, 153 id. 197.

The jurisdiction of the court to approve a deed made under its decree requires the court to inquire into and determine whether the party claiming the right to such deed has complied with section 216 of the Revenue law in regard to the giving of notices therein required before the time of redemption expired. A court of equity having obtained jurisdiction of an action for the foreclosure of a mortgage or other lien, and having decreed a sale of the premises, will retain its jurisdiction for the purpose of making any auxiliary orders necessary to carry into effect its former decree without compelling the party to resort to another action. (27 Cyc. 1739; *Vahle v. Brackenseik*, 145 Ill. 231.) We perceive no reason, on principle, why the same rule should not apply to proceedings to foreclose a lien for taxes under the statute. Since, as we have seen, it is necessary for the purchaser at such foreclosure sale to comply with section 216 in regard to serving notices and is not required to preserve the evidence of such compliance by filing an affidavit under section 217, the court of chancery wherein the proceeding is pending is necessarily the proper tribunal to determine whether said section 216 has been complied with and to make a finding in regard to that question, in order that all matters affecting the title to the real estate involved may appear of record. This course was pursued in the foreclosure proceeding now under con-

sideration. After the period of redemption had expired, appellees, who were the owners of the certificate of purchase, upon notice to appellants came into the court of equity wherein the decree of foreclosure had been rendered and presented a petition showing what had been done as a compliance with section 216 of the Revenue law. The decree of court entered upon this petition has already been set out in the preceding statement. The decree finds that the court had jurisdiction and that appellees had complied with the law entitling them to a deed. This finding in a collateral proceeding must be regarded as conclusive and binding upon all parties to the record and their privies. Appellants were parties to the original foreclosure proceeding and were duly notified of the filing of the petition upon which the supplemental decree was entered.

While we think it entirely proper that a purchaser at a foreclosure sale should apply to the court wherein the decree was rendered, either by motion or petition, and present evidence, as was done in this case, of a compliance with the law and the decree and obtain a finding of record of such compliance and that such purchaser was entitled to a deed and secure an order that such deed issue, still, if there was a valid decree and sale, and the purchaser had, in fact, complied with section 216 of the Revenue law, we do not hold that such auxiliary findings and order are essential to the validity of his title. The practical advantages of such course are apparent. Such an order, being within the jurisdiction of the court, is binding upon parties and privies, and precludes them from afterwards re-litigating all questions that were or might have been raised in such proceeding. The partition suit is collateral to the foreclosure proceeding. (VanFleet on Collateral Attack, secs. 4, 5.) This being true, the only ground upon which such decrees can be successfully attacked is want of jurisdiction. (*Springer v. Darlington*, 198 Ill. 121; *Sielbeck v. Grothman*, 248 id. 435.) The above principle applies to decrees

foreclosing tax liens the same as to other judgments and decrees. (*Hammond v. People, supra.*) By the statute taxes on real estate are expressly made "a prior and first lien on all such real property, superior to all other liens and encumbrances," and when such lien is foreclosed and a sale is had thereunder in pursuance of a valid decree and such purchaser complies with the law in regard to giving notice, such proceeding constitutes a new and independent title, free and clear from all previous titles and claims, of every kind and character. *Cooper v. Corbin*, 105 Ill. 224; *South Chicago Brewing Co. v. Taylor*, 205 id. 132; *Cooley on Taxation*, sec. 546; 37 Cyc. 1143.

Substantially all of appellants' argument is in support of objections made on the assumption that the foreclosure proceeding is open to collateral attack. Since, as we have seen, this assumption is not warranted, it is not necessary that the objections argued should be considered.

Appellants insist that it was error in the court to decree partition without ordering appellees to reimburse Glos for the amount of his tax sales and subsequent taxes. Numerous cases are cited holding that a decree setting aside a tax deed should require reimbursement as a condition of relief. There is no doubt of the rule contended for, but it can have no application here. The partition decree did not set aside any tax deeds that Glos or anyone else might have had. All such tax deeds held by parties to the record were cut off by the foreclosure decree and the sale thereunder. In the very nature of things a sale under a foreclosure of a "first and superior lien" could not be made subject to any prior lien or encumbrance. One of the purposes of providing for a foreclosure, in equity, of tax liens was to enable the State to collect, by sale, a part of the taxes which were a lien against the property. The theory of the law is, that a sale under such foreclosure is made in full satisfaction of all previous tax liens and encumbrances, and that the purchaser will not be required to pay or discharge

any liens or encumbrances above the amount of his bid. It would be absurd to say that a purchaser under such sale would take the land subject to all prior tax liens. If this were true, there would be no advantage in foreclosing such liens over a purchase for the full amount due at an ordinary tax sale. Again, if appellant Glos had any lien upon or other interest in the premises that was not subject to the tax lien being foreclosed, being a party to the foreclosure proceeding it was his duty to set up such lien or interest and have it adjudicated and settled in the foreclosure proceeding. Having failed to do so and having acquiesced in a decree finding that he had no such interest he is now barred by such foreclosure decree from making such claim in this suit. There was no error in refusing to make the reimbursement of Glos a condition of relief in the partition suit.

Appellants make the further contention that Emma J. Glos was a necessary party to the foreclosure proceeding, and that the court erred in proceeding to a final decree after she had been dismissed out of the case. Emma J. Glos has not appealed. She is not complaining of the decree. Whether the decree is binding upon her is a matter of which the other appellants cannot complain. This is a sufficient answer to this assignment of error without reference to others that might be made. A similar complaint is made because August A. Timke was not a party to the foreclosure case. Whatever interest Timke may have had in the premises was acquired by a trust deed executed by Jacob Glos after the commencement of the foreclosure proceeding and after service of summons upon Jacob Glos. His interest having been acquired after the commencement of the suit from a party to the record, he is bound by the decree without being made a formal party.

Finding no error in this record the decree of the superior court of Cook county is affirmed.

Decree affirmed.

THE PEOPLE *ex rel.* William H. Whiteside, County Collector, Appellee, *vs.* DRURY WEATHERHEAD, Appellant.

Opinion filed December 21, 1911—Rehearing denied Feb. 8, 1912.

1. DRAINAGE—*an appeal from commissioners' decision on objections to classification operates as a supersedeas.* When an appeal is taken by a land owner to the county court from the decision of drainage commissioners upon the objections to the classification of the lands, the commissioners have no power to levy and collect the drainage assessment against the lands of such owner until the appeal is disposed of, though they may levy and collect the tax as to the lands of owners not appealing. (*People v. Meyers*, 124 Ill. 95, and *People v. Grace*, 237 id. 265, distinguished.)

2. SAME—*decision of commissioners upon objections to classification is not final.* Drainage commissioners have no lawful authority to tax the lands more than they are benefited nor more than their just proportion of the benefits, and the decision of the commissioners is not made final upon such questions but may be reviewed on appeal to the county court.

3. SAME—*original classification fixed by the commissioners is final as to owners not appealing.* As to owners not appealing from the classification made by the commissioners such classification is the basis for the levying of the taxes against their lands, but as to land owners appealing to the county court the classification fixed by such court is final, and until such appeal is determined there is no basis for the levying of the tax against their lands.

APPEAL from the County Court of Rock Island county;
the Hon. R. W. OLMSTED, Judge, presiding.

SEARLE & MARSHALL, for appellant.

L. M. MAGILL, State's Attorney, and McENIRY & McENIRY, for appellee.

Mr. JUSTICE FARMER delivered the opinion of the court:

This is an appeal from a judgment of the county court against the lands of the appellant for delinquent drainage taxes. Appellant was dissatisfied with the classification of his lands by the commissioners and appealed therefrom to

the county court by filing bond as required, within the time required by statute. (Hurd's Stat. 1909, chap. 42, par. 98.) Notice of said appeal was served on the commissioners, and the parties appeared in the county court at the November term, 1910, where a trial by jury was had, as provided in paragraph 99 of chapter 42. During the progress of the trial the commissioners moved to dismiss the appeal for want of jurisdiction, but the motion was overruled. At the conclusion of the trial the jury were unable to agree and were discharged. The appeal had not been again tried but was still pending in the county court when the tax was levied and extended against appellant's lands on the basis of the classification made by the commissioners and when the application for judgment and order of sale was made to the county court. Appellant objected to judgment on the ground that an appeal was pending and undetermined. The objection was overruled and judgment was rendered for \$2246.12, the amount of the tax levied on the basis of the classification from which the appeal was prosecuted. The question therefore raised for our decision is, was the effect of perfecting the appeal to stay further proceedings by the commissioners to levy the tax against appellant's lands and enforce the same by a judgment and an order of sale while the appeal was still pending?

It seems to us there can be little doubt as to the law governing this question. We must assume appellant prosecuted his appeal to the county court because he thought the commissioners proposed to tax his lands too high. They had no lawful authority to tax his lands more than they were benefited or more than their just proportion of the benefits, and the decision of the commissioners upon these questions is not made final by the statute but may be reviewed upon appeal to the county court. When the appeal was perfected it operated, like appeals in other cases, as a *supersedeas* to stay further proceedings against the lands of appellant until the appeal was determined. (*Merrifield v.*

Cottage Piano Co. 238 Ill. 526; *Smith v. Chytraus*, 152 id. 664.) Paragraph 102 of chapter 42 provides that the appeal shall not operate to delay the collection of any tax from which no appeal is prosecuted. It is clear the legislature intended the right of appeal to be a substantial right. If, notwithstanding an appeal is prosecuted from the decision of the commissioners, they could proceed to levy the tax and sell the lands to pay it before the appeal was heard and decided the right of appeal would be a mockery. When the appellant perfected his appeal from the decision of the commissioners they had no authority to levy and extend the tax against his lands until the appeal was disposed of. They could proceed to levy and collect the taxes against the lands whose owners did not appeal, because as to those lands the classification made by the commissioners was the basis for levying the taxes, but paragraph 99 makes the classification as fixed and determined on appeal to the county court final, and the classification thus fixed is required to be entered upon the drainage records and it becomes the basis for the levy and extension of the tax. It cannot be known, therefore, when an appeal is taken from the classification made by the commissioners, what is the basis for determining the amount of the taxes to be levied until the appeal is determined.

Appellee cites *People v. Meyers*, 124 Ill. 95, and *People v. Grace*, 237 id. 265, as sustaining the proposition that the commissioners have authority to proceed to levy the tax according to the classification made by them while an appeal is pending. In those cases it appears the commissioners proceeded with the levy of the tax while an appeal was pending, but before application was made for judgment and sale against the land the appeals were decided and the tax reduced. What was decided in the cases referred to was, that the collector was not entitled to judgment against the lands for a greater tax than was fixed by the jury upon the appeal. In the *Meyers case* the court held that the judgment

on appeal was conclusive as to the amount of benefits, and the appealing land owner could in no event be required to pay any greater sum.

In our opinion the county court erred in overruling appellant's objection, and the judgment is reversed and the cause remanded, with directions to sustain the objections.

Reversed and remanded, with directions.

LESLIE R. WETMORE *et al.* Defendants in Error, *vs.* MARK WATSON, Plaintiff in Error.

Opinion filed December 21, 1911—Rehearing denied Feb. 8, 1912.

1. SPECIFIC PERFORMANCE—a contract to convey land must describe the land so that it may be located. A contract to convey real estate will not be specifically enforced unless it describes the land with sufficient certainty to enable it to be located.

2. SAME—when contract does not sufficiently describe the land. A contract whereby the first party agrees, upon condition that he shall inherit, by will, the "lands or real estate now owned" by a certain person, to deed to the second party "one hundred (100) acres of said land or real estate situated in Fayette county, Illinois," does not sufficiently describe the land, where there are six hundred acres of land in such county which are owned by the person referred to.

WRIT OF ERROR to the Circuit Court of Fayette county; the Hon. A. M. ROSE, Judge, presiding.

NOLEMAN & SMITH, and ARTHUR ROE, for plaintiff in error.

BROWN & BURNSIDE, G. T. TURNER, and JOHN A. BINGHAM, for defendants in error.

Mr. JUSTICE COOKE delivered the opinion of the court:

Defendants in error Leslie R. Wetmore and DeLaskie Wetmore filed their bill in the circuit court of Fayette county for the partition of real estate owned by Mary W.

Lee, deceased. To this bill Mark Watson, the plaintiff in error, and the defendants in error Ewald Vick and the St. Louis Union Trust Company, as executors and trustees under the last will and testament of Moses C. Wetmore, deceased, the remaining heirs-at-law of Mary W. Lee and the legatees and devisees of said Moses C. Wetmore, were made parties defendant. Plaintiff in error answered the bill and filed a cross-bill. To this cross-bill the complainants in the original bill and the defendants Justin J. Wetmore and the executors of the last will of Moses C. Wetmore filed demurrers. The demurrers were sustained and the cross-bill was dismissed for want of equity. From that decree this appeal has been prosecuted.

By the original bill it was alleged that at the time of her death, on March 17, 1910, Mary W. Lee was the owner of six hundred acres of land in Fayette county; that she died testate and by her will devised all her property, both real and personal, in trust to Moses C. Wetmore, with directions to make such distribution of the same among her heirs-at-law, and in such proportions, as in his discretion he should deem each of them worthy. It was then alleged that Mrs. Lee left surviving her as her only heirs-at-law, Orvilla A. Lee, her sister, and Moses C. Wetmore, Justin J. Wetmore, Leslie R. Wetmore and DeLaskie Wetmore, her nephews; that Moses C. Wetmore died testate on November 26, 1910, without having made any distribution of the property of Mary W. Lee under her will, except an advancement of \$997 to Orvilla A. Lee and \$500 to Justin J. Wetmore. The bill prayed for a division and partition of the lands therein described among the surviving heirs-at-law of Mary W. Lee.

The cross-bill of plaintiff in error alleged that Mary W. Lee was a woman in feeble health; that for several months prior to August, 1907, plaintiff in error and his wife resided with her in her home and assisted her in caring for and managing her property and looked after her personal

comfort and welfare; that the services so rendered were so satisfactory to Mrs. Lee that she opened negotiations, through her nephew, Moses C. Wetmore, to induce plaintiff in error to enter into a contract to remain with her and care for her and look after her property during the remainder of her natural life; that said Wetmore had been for many years the adviser of Mrs. Lee in her business affairs; that he was prevented, by reason of his own large business interests, from giving the attention he desired to her affairs; that he had investigated the character of the services plaintiff in error had rendered his aunt and was desirous of procuring him to remain in her service; that after the execution by Mary W. Lee of her will, and with full knowledge of the execution and contents of such will, Moses C. Wetmore, acting either in his own individual capacity or as agent for Mary W. Lee, entered into the following contract with plaintiff in error:

"This agreement, made and entered into this 21st day of September, 1907, by and between M. C. Wetmore, of the city of St. Louis, State of Missouri, party of the first part, and Mark Watson, of Shobonier, State of Illinois, party of the second part:

"*Witnesseth:* That for and in consideration of one dollar (\$1.00) in hand paid by Mark Watson, party of the second part, to M. C. Wetmore, party of the first part, the receipt of which is hereby acknowledged by M. C. Wetmore, it is hereby agreed that if the land or real estate now owned by Mrs. Mary W. Lee, of Shobonier, Illinois, is inherited by will by the said M. C. Wetmore, party of the first part, that he will deed, without further monetary consideration, to the said Mark Watson, party of the second part, one hundred (100) acres of said land or real estate situated in Fayette county, State of Illinois: *Provided, however,* that said Mark Watson, party of the second part, agrees and remains with Mrs. Mary W. Lee as long as she lives and takes care of her and treats her kindly during her lifetime. And if the said party of the second part quits the service or abandons Mrs. Mary W. Lee, then this contract or agreement is to be null and void.

"In witness whereof we have hereunto set our hands and seals the day and year first above written.

M. C. WETMORE, (Seal)
MARK WATSON. (Seal)"

The cross-bill then alleges that after the execution of this contract plaintiff in error remained with Mary W. Lee and complied with the terms of the agreement until the time of her death; that he has been informed and believes that the contract entered into by him and said Wetmore was made at the request and with the knowledge of Mary W. Lee, and that during her lifetime she gave directions in writing to said Wetmore as to what portion of her real estate she desired to be set off to plaintiff in error; that the contract entered into between plaintiff in error and Wetmore was executed after the execution of said will, as a part of a plan and agreement between Mary W. Lee and said Wetmore whereby the services of plaintiff in error were to be engaged and he was to be compensated out of the estate of Mary W. Lee; that all the land owned by Mary W. Lee at the time of her death passed to said Wetmore, but notwithstanding the performance of the terms of the agreement on the part of plaintiff in error said Wetmore did not convey to him one hundred acres of land and did not devise such land to him by his last will and testament. The cross-bill prays for specific performance of the contract by the successor in trust of Wetmore, as trustee under the will of Mary W. Lee, in the event that it should be found that Wetmore entered into the contract as her agent, and in case it should be found that the contract was the personal transaction of the said Wetmore, that then the executor of his last will and testament be decreed specifically to perform out of any lands received by the estate of Wetmore from the estate of said Mary W. Lee. In the event that the estate of said Wetmore should not receive enough of the real estate of Mary W. Lee out of which to specifically perform the contract, the cross-bill prays that the estate of Wetmore should be decreed to convey the lands it does receive and to pay plaintiff in error the fair cash value of the difference.

In any view that could be taken of the other various questions raised, this contract cannot be specifically enforced for the reason that there is no accurate description of the property to be conveyed. The cross-bill alleges that when the contract was executed Mrs. Lee was the owner of six hundred acres of land. The contract recites that if the land then owned by Mrs. Lee is "inherited by will" by Moses C. Wetmore he will convey one hundred acres of it to plaintiff in error. Any one hundred acres out of the whole six hundred may have been referred to, as there is no means of determining what particular one hundred acres were intended. The cross-bill alleges that plaintiff in error has been informed that subsequently to the execution of the contract Mrs. Lee gave certain instructions and directions as to the land she desired to be set off to plaintiff in error out of her estate under this contract and that those instructions were in writing and signed by Mrs. Lee, but it does not allege that these instructions contained a description of the land any more definite than that provided in the contract. There are no allegations that these instructions were ever conveyed to the plaintiff in error or were known to him, or that it was ever agreed that he was to receive any particular tract of land, or that at the time of the filing of his cross-bill he had any knowledge of what particular one hundred acres of land were referred to, or were understood to be referred to, by either Wetmore or Mrs. Lee, and nowhere in the cross-bill does he attempt to designate or describe the one hundred acres he claims to be entitled to have conveyed to him. A contract to convey real estate will not be specifically enforced unless it describes the land to be conveyed with sufficient certainty to enable it to be located. *Hamilton v. Harvey*, 121 Ill. 469; *Glos v. Wilson*, 198 id. 44; *Fowler v. Fowler*, 204 id. 82.

The chancellor properly dismissed the cross-bill for want of equity, and the decree of the circuit court is affirmed.

Decree affirmed.

RICHARD LATHAM *et al.* Appellees, *vs.* THE ILLINOIS CENTRAL RAILROAD COMPANY, Appellant.

Opinion filed December 21, 1911—Rehearing denied Feb. 9, 1912.

1. **DEEDS**—*conditions subsequent are not favored but are lawful if not opposed to public policy.* Conditions subsequent are not favored in law and courts incline against them in case of doubt, but if the intention to create such an estate is clear and the restrictions are not opposed to public policy, courts will give effect to and enforce them.

2. **SAME**—*when a deed to land for depot sites is upon condition subsequent.* Where a deed to lots recites that it is made in consideration of the location, erection and maintenance, for all time to come, of a passenger depot and a freight depot, and for the "uses and purposes hereinafter mentioned and for none other," following which is a description of the premises, a recital that the lots are conveyed for "railroad purposes only," a covenant to erect the depots, a provision for reverter of title in case of non-user, and an *habendum* clause reciting that the grantee, its successors and assigns, shall hold the premises subject "to all conditions, covenants, agreements and limitations in this deed expressed," the estate created is upon condition subsequent, and if the depots are not built or are removed the title reverts.

3. **SAME**—*what does not show that there has been no breach of condition subsequent.* In ejectment against a railroad company, where the plaintiff claims that the title has reverted because of a breach of a condition requiring the company to forever maintain a passenger depot on the lot, testimony, based largely upon hearsay, designed to show that the company was contemplating the erection of another passenger depot on the lot to replace the one it had removed some five years before the suit was brought, does not show that there has been no breach of the condition.

4. **SAME**—*when conditions in deed are not personal to grantee.* Where a deed to a railroad company recites that the grantee, its "successors and assigns," takes the estate granted subject "to all the conditions, covenants, agreements and limitations in this deed expressed," a condition in the deed requiring the grantee to erect and forever maintain passenger and freight depots on the lots is not merely personal to the grantee but is in the nature of a covenant running with the land, and where the deed is duly recorded the grantee's successors and assigns have notice of the condition and are bound thereby, notwithstanding the depots were not in existence when the deed was made but were to be constructed in the future.

APPEAL from the Circuit Court of Logan county; the Hon. T. M. HARRIS, Judge, presiding.

C. EVERETT SMITH, (JOHN G. DRENNAN, of counsel,) for appellant.

BEACH & TRAPP, for appellees.

Mr. JUSTICE FARMER delivered the opinion of the court:

This is an action of ejectment brought by the appellees against appellant to recover two tracts of land in the city of Lincoln, Illinois, particularly described in the declaration by metes and bounds. Said premises are designated in the briefs as tract 1 and tract 2, and for convenience will hereafter be so designated in this opinion. In 1872 Robert B. Latham and wife, and John Wyatt, a widower, all of the city of Lincoln, conveyed to the Indianapolis, Bloomington and Western Railway Company the premises in controversy for railroad purposes, tract 1 to be used for the erection and maintenance thereon of a passenger depot and tract 2 for a freight depot. The deed is a lengthy instrument, setting out the terms, conditions and agreements upon which it is made, and provides that in case of the non-user of the premises for the uses and purposes mentioned in the deed, the title to the premises should revert to the grantors, their heirs, executors, administrators and assigns. The appellees, who were plaintiffs below, are the heirs and successors in title of the grantors in that deed. Appellant has succeeded to the rights, franchises and property of the grantee in said deed. No freight depot was ever erected on tract 2. A passenger depot was erected and maintained on tract 1 for several years. About the same time that appellant succeeded the Indianapolis, Bloomington and Western Railway Company in the management and operation of its line of railroad, it also acquired the Peoria, Decatur and Evansville railway, which crosses the former line in the city of

Lincoln. Prior to 1904 there were depots in the city of Lincoln on both these railroads. The depot of what was formerly the Indianapolis, Bloomington and Western railway, and which was on tract 1 of the premises in controversy, was within about three blocks of the court house in the city of Lincoln. The depot of the other railroad was something over a mile distant from the public square. In 1904 the depot on what was formerly the Peoria, Decatur and Evansville railway burned, and thereupon the appellant moved the depot from tract 1 to the site of the depot that had burned down. Since then it has never erected or maintained a passenger depot on tract 1. The appellees contend that the conveyance to the railroad company was upon a condition subsequent, and that by reason of the failure of the railroad company to erect a freight depot on tract 2 and the removal by it of the depot from tract 1, and the failure to maintain a passenger depot upon said tract as provided for in the deed, the title to the premises reverted to appellees. This suit was begun by appellees to recover the premises, at the January term, 1909. There was a trial before the court without a jury, resulting in a judgment in favor of appellees. Appellant paid the costs and was granted a new trial under the statute. The second trial was before the court without a jury and also resulted in a judgment for appellees, from which this appeal is prosecuted.

Appellant contends (1) that the premises in controversy were conveyed for railroad purposes and that the provisions in the deed with reference to the maintenance of depots is a covenant, and that there can be no forfeiture until appellant fails to use the premises for railroad purposes; (2) that there has been no abandonment of the premises for depot purposes, that the removal of the depot from tract 1 was temporary, and, if the deed is to be construed as appellees contend for, there has been no substantial breach of the condition; (3) that the depot not being in existence when the deed was made but was agreed to be

constructed in the future, even if the conveyance was upon a condition, it does not bind appellant, the successor of the grantee in the deed.

The deed is a very lengthy instrument, and we deem it necessary to set out only the substance of the parts material to a decision of this controversy.

The Indianapolis, Bloomington and Western Railway Company is the grantee in the deed. The deed recites that it is made in consideration of the advantages and conveniences which may or will result to the grantors from the construction and operation of the railroad as located and surveyed, and in consideration of the location, erection and maintenance, for all time to come, of a passenger depot and a freight depot upon the premises thereafter described; also in consideration of the faithful performance by the grantee of the covenants and agreements thereafter mentioned and a consideration of one dollar. The deed recites that it is made to the grantee, "their successors and assigns forever, for the uses and purposes hereinafter mentioned, and for none other." Then follows a description of the premises, after which the deed recites that the premises are conveyed to the grantee for "railroad purposes only," and that by the acceptance of the deed the grantee covenants and agrees with the grantors that it will erect and maintain a suitable passenger depot on that part of the premises designated as tract 1, and that it shall not have the right to erect any other buildings on said tract except such other buildings as may be necessary for the accommodation and convenience of passengers and passenger traffic, the intention of the grantors being that said tract shall be devoted exclusively to the accommodation of passengers and passenger traffic. The grantee also covenants and agrees with grantors to erect and maintain a suitable and sufficient freight depot, and further covenants and agrees "that in case of non-user of said premises so conveyed for the uses and purposes aforesaid, that then and in that case the title to

said premises shall revert back to said parties of the first part, [grantors,] their heirs, executors, administrators and assigns." The *habendum* clause recites that the grantee, its successors and assigns, are to have and hold the premises forever, "subject, nevertheless, to all the conditions, covenants, agreements and limitations in this deed expressed," and further recites that the user of the premises for twenty years or more shall not impair or abridge any of the conditions of the deed or be construed as a limitation upon any of the rights of the grantors, their heirs and assigns.

While conditions subsequent are not favored in law and in case of doubt courts incline against such estate, yet where the restrictions are not opposed to public policy it is lawful to create such estates, and where the intention is clear that such an estate was intended, courts will give effect to and enforce them. (*Star Brewery Co. v. Primas*, 163 Ill. 652; *Eckhart v. Irons*, 128 id. 568; *Lyman v. Suburban Railroad Co.* 190 id. 320; 2 Elliott on Railroads, sec. 939; *C., C., C. and I. Ry. Co. v. Coburn*, 91 Ind. 557; *Horner v. Chicago, Milwaukee and St. Paul Railway Co.* 38 Wis. 165.) We think no other reasonable construction can be placed upon the deed here in question than that it created an estate in the grantee upon condition subsequent. The grantors expected to receive benefits to other property owned by them from the construction of the road and the erection and maintenance of depots upon the property in dispute. They therefore, without other consideration, donated or conveyed it to the grantee upon the faith of its undertaking and promise to keep and perform its agreements recited in the deed. The property was conveyed to the grantee for railroad purposes, but the particular railroad purposes were the erection and maintenance thereon of depots. The grantee accepted the conveyance upon the conditions named and agreed to erect and maintain the depots in accordance with the terms and conditions created in the deed. It was expressly stipulated in the deed

that in case the grantee failed to use the premises for the purpose for which they were conveyed the title would revert to the grantors or their heirs. Language, it seems to us, could not make it plainer that the grantee took an estate in the premises upon a condition subsequent; and upon a breach of the condition the title reverted.

Appellant's contention that the premises have not been abandoned for depot purposes and that there has therefore been no breach of the condition is based upon certain testimony as to its intentions, of witnesses offered by it. This testimony was heard subject to objection. W. S. Williams, trainmaster until 1910 and after that division superintendent, testified it was appellant's intention to build a new and better depot on tract 1, and that in the budgets of 1908-09 recommendation was made to the general officers of appellant for a depot, costing from \$32,000 to \$35,000, on the old site; that a former vice-president and general manager told witness the company would build a depot if not hindered by this litigation. This witness also testified that on three occasions in the years 1905 and 1906 the company erected temporary structures at the old site, in which they sold tickets to passengers who boarded trains at that place. This was done to accommodate passengers on excursions for a short distance, for which trains were run. The witness also testified that a freight train each way every day, to which a combination passenger and baggage coach was attached, was stopped at the old site to receive and discharge passengers but no tickets were sold there. Passengers boarding the train there were permitted to pay two cents fare on the train for passage to the depot. The land agent of the appellant testified that he had been designated by it to investigate the facts of this case; that he made inquiries of the superintendent and assistant to the president, who would have charge of such matters, and was told by the assistant to the president that the company desired to re-build the depot but had been interfered with by

this suit. Most of this evidence was wholly incompetent, but it entirely failed to show that there had been no breach of the conditions. *Lyman v. Suburban Railroad Co. supra*; *Gray v. Chicago, Milwaukee and St. Paul Railway Co.* 189 Ill. 400; *Hamel v. Minneapolis Railroad Co.* 97 Minn. 334; *City of East St. Louis v. Illinois Central Railroad Co.* 238 Ill. 296.

Lastly, it is contended that since the depots were not in existence when the deed was made but were agreed to be constructed in the future, the appellant, being the assignee of the grantee, and assignees and successors not being specifically mentioned in the deed, is not bound by the agreement of the grantee to construct the depots. The conditions in the deed were not merely personal to the grantee, but were, as said in *Lyman v. Suburban Railroad Co. supra*, in the nature of covenants running with the land. The deed recites that the grantee, its "successors and assigns," takes the estate granted, subject "to all the conditions, covenants, agreements and limitations in this deed expressed." The deed was duly recorded, and the appellant had notice, when it succeeded to the rights of the grantee, of the conditions upon which the title was held. The provisions of the deed are so different from those of the instrument creating the estate in *Emerson v. Simpson*, 43 N. H. 475, (82 Am. Dec. 168,) that the rules applied in that case cannot be applied in this case. To hold that the grantee in the deed could convey an estate to its successor or assign divested of the conditions upon which it held the estate, would be contrary to the plain language of the deed and unwarranted by any authority to which we have been referred or with which we are familiar.

The rulings of the court in holding and refusing propositions of law were in accordance with the views we have herein expressed, and in our opinion no error was committed in that respect.

The judgment is therefore affirmed.

Judgment affirmed.

THE PEOPLE *ex rel.* E. G. Williamson, County Collector,
Appellee, *vs.* THE CHICAGO, BURLINGTON AND QUINCY
RAILROAD COMPANY, Appellant.

Opinion filed December 21, 1911—Rehearing denied Feb. 8, 1912.

1. TAXES—the amount levied under description “contingent expenses” must be small in proportion to total tax. To justify the levy of a tax by a county or a city under the description of “contingent expenses” the amount must be small in proportion to the total tax and be reasonable in view of the size and population of the municipality levying the tax, and the Supreme Court will take judicial notice of the size and population of such municipality where objection is made to the amount of the tax.

2. SAME—when a levy for “contingent expenses” is excessive. A tax levy by a county for “contingent expenses” in an amount equal to one-ninth of the total tax levied for all county purposes, and a like levy by a city in an amount equal to one-eighth of the total city tax, are excessive and cannot be sustained over an objection on that ground.

3. SAME—a certificate stating no contingency at all will not support additional road tax. An additional road tax levied under section 14 of the Roads and Bridges act cannot be sustained where the certificate of the highway commissioners on which the tax is based does not show any contingency at all.

4. SAME—when objection that amount due for taxes was not deposited before appeal, comes too late. An objection that the record does not show that the amount of the judgment for taxes was deposited before the appeal was perfected comes too late, where no motion was made to dismiss the appeal and the case was submitted to the court on its merits, without objection, for decision upon the errors assigned.

APPEAL from the County Court of Stark county; the
Hon. B. F. THOMPSON, Judge, presiding.

WRIGHT & WRIGHT, (J. A. CONNELL, and WILLIAM
D. BARGE, of counsel,) for appellant.

J. H. RENNICK, State’s Attorney, and J. W. FLING,
JR., for appellee.

Mr. JUSTICE HAND delivered the opinion of the court:

This was an application for judgment and order of sale in the county court of Stark county by E. G. Williamson, as county collector, against the property of the appellant, the Chicago, Burlington and Quincy Railroad Company, for certain taxes extended by the county clerk of said county for the year 1910. The railroad company appeared and filed objections to the rendition of judgment and order of sale as to the following taxes: County tax, \$88.78; city of Wyoming tax, \$47.25; town of Osceola road and bridge tax, \$231.57; town of Penn road and bridge tax, \$87.63; town of Essex road and bridge tax, \$115.15. The court overruled the objections and rendered judgment and order of sale against the appellant's property, and it has prosecuted this appeal.

The first objection made is as to the county tax. The record shows the board of supervisors made a tax levy for county purposes of \$18,000, specifying its various purposes in detail, which included \$2000 for "contingent and general expenses," which it is objected was an excessive amount to be levied under so general a specification, by virtue of the requirements of section 121 of chapter 120, (Hurd's Stat. 1909, p. 1846,) which provides that when a county tax levy is made for several purposes the amount for each purpose must be stated separately. The second objection is to the city tax of the city of Wyoming. The record shows a tax levy by the city council of the city of Wyoming, for all purposes, of \$4600, which specified in detail the purposes for which the levy was made, and which included \$600 for "contingent and general expenses," which it is also objected was an excessive amount to be levied under so general a specification, by virtue of paragraph 111 of chapter 24, (Hurd's Stat. 1909, p. 356,) which declares that a tax levy for city purposes shall be made by an ordinance which specifies in detail the purposes for which the

tax levy is made. The objections made to said county and city taxes being the same, the two objections will be considered together.

In a number of cases heretofore decided by this court it was held a tax levy for "current expenses," for "county purposes," for "county revenue," for payment of "county claims," for payment of "contingent expenses for the use and benefit of the town," was too indefinite and uncertain to sustain a tax levy. (*Chicago, Burlington and Quincy Railroad Co. v. People*, 213 Ill. 458; *Cincinnati, Indianapolis and Western Railway Co. v. People*, 213 id. 197; *Chicago and Eastern Illinois Railroad Co. v. People*, 214 id. 23; *People v. Cincinnati, Indianapolis and Western Railway Co.* 224 id. 523; *People v. Cleveland, Cincinnati, Chicago and St. Louis Railway Co.* 231 id. 209; *People v. Illinois and Indiana Railroad Co.* 231 id. 377.) The doctrine of these cases has, however, been modified in *People v. Cairo, Vincennes and Chicago Railway Co.* 237 Ill. 312, *Same v. Same*, 247 id. 360, and *People v. Chicago and Eastern Illinois Railroad Co.* 249 id. 549, to the extent that it is now held that under the designation "contingent expenses," or other similar designation, a small sum may be provided by a tax levy with which items of expense may be paid which will necessarily arise during the year and which cannot appropriately be classified under any of the specific purposes for which other taxes are levied. In *People v. Cairo, Vincennes and Chicago Railway Co.* 237 Ill. 312, the amount levied for incidentals was \$100, and in *People v. Cairo, Vincennes and Chicago Railway Co.* 247 Ill. 360, the amount levied was \$500, but no question was made as to the amount of the levy; and in *People v. Chicago and Eastern Illinois Railroad Co. supra*, one levy was for \$609 and the other for \$500, and in that case no question was made as to the amount of the taxes levied. In this case the amount levied as a county tax for "contingent and general expenses" was \$2000, which was one-ninth of

the total taxes levied in Stark county for "county purposes" for the year 1910, and the amount levied as a city tax in the city of Wyoming for "contingent and general expenses" was \$600, which was about one-eighth of the total taxes levied for the year 1910, and the objections were here specifically made that each of said amounts levied for "contingent expenses" was excessive for the purpose for which the levy was made. In *People v. Illinois Central Railroad Co.* 237 Ill. 324, it was said the court would take judicial notice of the size and population of the municipality making the tax levy, and determine whether or not, in view of its wealth and population, a tax levy for contingent purposes was an unreasonable amount to be levied under the general designation of "contingent expenses" or other similar general designation. In *People v. Cleveland, Cincinnati, Chicago and St. Louis Railway Co.* 231 Ill. 209, it was said: "It is the object of said section 121, and similar statutes, to give the tax-payer an opportunity to know for what purpose taxes are being levied and collected, and to give him an opportunity, if necessary, to prevent an unjust levy for the purpose of taxation." To permit a taxing body to levy one-eighth or one-ninth of the entire tax levied in the municipality for one year for the purpose of paying the "contingent and general expenses" of the municipality would be, as was said in the last case, to permit a taxing body to include matters in the levy which they were not authorized to include, and the tax-payer would be placed in a position where he would be unable to determine for what he was being taxed. While in the later decisions of this court a small amount may be levied for contingent and general expenses, such levy must be for an inconsiderable amount and not for a considerable portion of the total tax levy. In view of our former decisions upon this subject we have therefore reached the conclusion that the county tax and the city tax of Wyoming objected to cannot be sustained as valid tax levies.

It is next objected that the levies of the road and bridge taxes under section 14 of the Roads and Bridges act in the towns of Osceola, Penn and Essex over thirty-six cents on the \$100 are void by reason of the fact that no contingency was shown to exist which authorized such levies. The certificates of the highway commissioners of said towns as made by such commissioners failed to show that any contingency whatever existed in either of said towns which authorized any additional tax levy under section 14. This court has repeatedly held that before an additional tax levy can rightfully be made under section 14 a contingency must be shown to exist,—that is, the certificate of the commissioners must state that the tax is required to meet a contingency and must state what the contingency is, and the contingency must be some unusual or extraordinary event in the nature of a casualty, which does not happen regularly and in the ordinary course of nature. (*People v. Lake Erie and Western Railroad Co.* 248 Ill. 32.) A certificate by commissioners which does not show such a contingency is void and will not support a tax levy. (*People v. Kankakee and Southwestern Railroad Co.* 231 Ill. 109.) The certificates of the commissioners of highways of said several towns did not state a contingency at all, and an additional levy under section 14 of the Roads and Bridges act was therefore insufficient to authorize the levy of an additional road and bridge tax in said towns, and the tax as levied cannot be sustained.

It is finally contended by the appellee that the appeal in this case was improperly allowed, as it does not appear from the record that the amount of taxes for which judgment was rendered was deposited with the county collector before the appeal was perfected. No motion was made in this court to dismiss the appeal, but briefs were filed by both parties and the case was submitted to the court upon its merits and taken for decision, without objection, upon

the errors assigned. The objection comes, therefore, too late. *Wabash Railroad Co. v. People*, 196 Ill. 606.

The judgment of the county court of Stark county will be reversed and the case remanded.

Reversed and remanded.

HELEN R. KIMBALL *et al.* Appellants, *vs.* THE CITY OF CHICAGO, Appellee.

Opinion filed December 21, 1911—Rehearing denied Feb. 9, 1912.

1. DEDICATION—*presumption that a deed was delivered on its date is rebuttable.* The presumption that a deed was delivered on its date is one of fact, which is rebuttable and is overcome by the fact that after the date of the deed, but before it was recorded, the grantor, in acknowledging a plat, certified before the proper officer that he was then the owner of the land.

2. SAME—*what fact goes merely to question whether plat was a statutory one.* The fact that a deed conveying all of the premises included in a plat was dated prior to the time the plat was acknowledged by the grantor, though the deed was not recorded until after the plat had been acknowledged, approved and recorded, goes merely to the question whether the plat was a statutory or common law plat.

3. SAME—*offered dedication of strip for alley cannot be withdrawn after acceptance.* If the purchaser of a platted tract of land immediately recognizes the plat by making conveyances with reference thereto he and his grantees are estopped to deny that the plat is at least a good common law plat, and if a strip of land shown thereon as a public alley is accepted by the city as a public alley, said purchaser cannot thereafter lawfully withdraw the dedication by conveying the strip to the owners of abutting lots.

4. SAME—*strip need not be marked on plat as an alley in order to show intention to dedicate it.* In order to show an intention to dedicate a strip of land for the use of the public as a street or alley it is not essential that the strip be so designated, in terms, on the plat, provided such intention is manifested by a consideration of the entire plat, including the figures thereon, the surrounding streets and alleys and their connection with the strip in question.

5. SAME—*when it is presumed that all streets and alleys of a subdivision have been accepted.* Acceptance of the streets and al-

leys shown on a common law plat may be express, as evidenced by ordinance or resolution, or may be implied from the acts of the city or the public by making improvements or by travel; and where it clearly appears that the principal streets and alleys of a subdivision have been accepted by the city by paving, putting in sidewalks, sewers and the like, it must be presumed that all the streets and alleys were accepted, in the absence of anything to show the acceptance was limited.

6. *SAME—ordinance recognizing legal existence of alley is evidence of acceptance.* An ordinance which recognizes the legal existence of an alley shown on a common law plat by authorizing an abutting owner to lay a track across the strip to connect with the tracks of a railroad company is evidence of an acceptance of the strip as a public alley.

APPEAL from the Superior Court of Cook county; the Hon. W. FENIMORE COOPER, Judge, presiding.

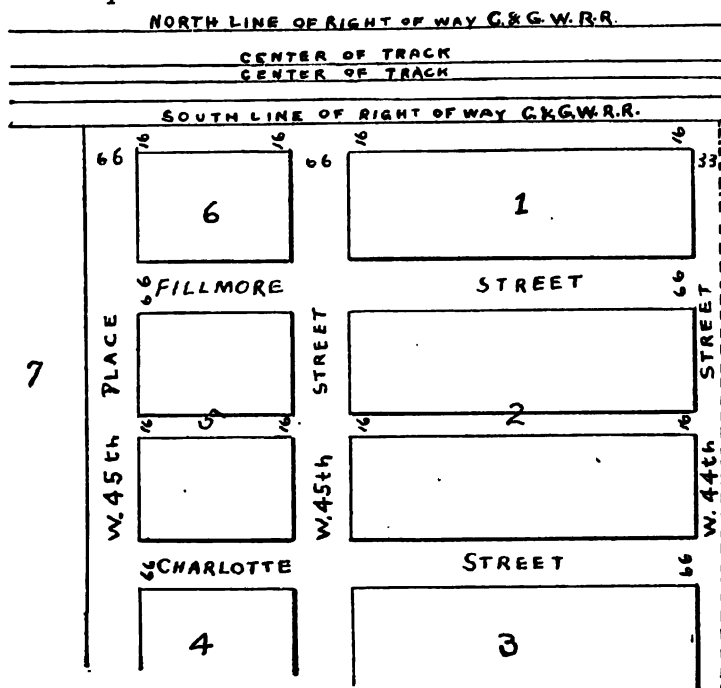
WILLIAM S. CORBIN, for appellants.

WILLIAM H. SEXTON, Corporation Counsel, and HENRY A. BERGER, for appellee.

Mr. JUSTICE HAND delivered the opinion of the court:

This was a bill in chancery filed by appellants to restrain the city of Chicago, the appellee, from taking possession of or from in any way interfering with the possession, use, enjoyment and control by the appellants of a strip of land sixteen feet wide lying between the south line of the right of way of the Chicago and Great Western Railroad Company and the north line of blocks 1 and 6 in D. S. Place's addition to the city of Chicago, being a subdivision of the east half of the south-west quarter of section 15, township 39, north, range 13, east of the third principal meridian, lying south of the right of way of the Chicago and Great Western railroad, except the west thirty-three feet thereof. An answer and replication were filed and a decree was entered dismissing the bill for want of equity, and an appeal has been prosecuted to this court.

The following sketch taken from the plat shows the *locus in quo*:



It appears from the record that on March 28, 1890, George F. Stodder executed a plat of said premises, which were described as D. S. Place's third addition to Chicago; that on the same day Sylvester N. Howard, a surveyor, certified that he had surveyed said premises and had subdivided the same into lots, blocks, streets and alleys, all of which were correctly represented upon the plat, to which his certificate was attached; that on the same day the Greeley-Carlson Company, by Gustaf H. Carlson, certified that it had platted said subdivision in accordance with said survey; that on the 29th day of March, Hiram Holbrook Rose, trustee, attached his approval to said plat; that on the 5th day of April George F. Stodder personally appeared before Frank R. Lindop, a notary public, and certified that

he was the owner on that day of said land and acknowledged the plat; that on April 9 the plat was examined by the city examiner of subdivisions and approved, and on the 11th day of April, 1890, the plat was filed for record and recorded in the recorder's office of Cook county.

The question to be determined upon this record is, was the strip of land situated between the south line of the right of way of the Chicago and Great Western Railroad Company and the north line of blocks 1 and 6 of said subdivision dedicated as a public alley on said plat of said subdivision, and if it was so dedicated was such offer of dedication accepted by the city? In other words, is said strip one of the public alleys of the city of Chicago and under the control of the city, or is it the private property of the owners of the lots in blocks 1 and 6 of said subdivision?

It further appears from the record that on April 3, 1890, George F. Stodder and wife executed a deed to Samuel Kerr of all their interest in that part of the east half of the south-west quarter of section 15, aforesaid, lying south of the right of way of the Chicago and Great Western Railroad Company, except the west thirty-three feet thereof; that said deed was acknowledged by the grantors on April 4 and was recorded on June 21, 1890; that on August 4, 1890, Samuel Kerr conveyed all the lots in blocks 1 and 6 in said subdivision to John C. Schumacher, and that the present owners of the lots in blocks 1 and 6 hold their title through *mesne* conveyances from said John C. Schumacher; that on May 1, 1910, Samuel Kerr quit-claimed said strip between the right of way of the Chicago and Great Western Railroad Company and the north line of blocks 1 and 6 to William C. Coburn, the attorney for the appellants and the adjoining lot owners, and he on the same day quit-claimed the strip to his clients, who owned lots adjoining said strip, and that the strip was immediately enclosed by fences by the respective lot owners with their lots, and this bill was then filed.

The first contention of the appellants is, that George F. Stodder was not the owner of the east half of the southwest quarter of section 15, aforesaid, at the time D. S. Place's Third addition to Chicago was platted, and did not, therefore, have the right to subdivide said land, as on the third day of April he had conveyed the same to Samuel Kerr and the plat was not completed and recorded until April 11. The deed to Kerr bore date of April 3, was acknowledged April 4 and recorded June 21, and the presumption is that the deed was delivered on its date. That presumption is one of fact, however, and is rebuttable, and we think the presumption of delivery on the date of the deed is rebutted by reason of the fact that after the date of the deed, but before it was recorded, George F. Stodder certified before an official authorized to take his acknowledgment, that on the 5th day of April, and subsequent to the date of the deed to Kerr, he was the owner of the said premises. If, however, the presumption of delivery was not rebutted by that fact and Stodder was not the owner of said premises at the time he caused the land to be subdivided, that fact would only go to the question whether the plat filed by him was a statutory plat and conveyed the fee of the streets and alleys to the city of Chicago, or a common law plat; and from the view we take of this case it is immaterial whether said plat is to be treated as a statutory or common law plat, as Kerr immediately recognized the said plat by making conveyances with reference thereto, and he and his grantees are estopped to deny that said plat is at least a good common law plat of said subdivision, and if said strip was offered by said plat to be dedicated as a public alley, and it was accepted by the city as a public alley before the offer of dedication was withdrawn, this bill cannot be maintained.

It is next contended that said plat did not constitute an offer by Stodder to dedicate said strip to the city as a public alley, as said strip was not marked or designated upon

the plat as an alley. It is, we think, clear from the plat that said strip, although not marked as such on the plat by the word "alley," was intended by the platlor to be dedicated to the city as an alley. The width of the alley at each street intersection is marked with the figures "16," which figures, we think, were placed upon said plat to designate the width of said strip to be sixteen feet, and the street lines where they intersect said strip north of blocks 1 and 6 do not cross said strip, as they would had it not been the intention of the platlor to dedicate said strip to the public as an alley,—that is, the strip at each street intersection is left open and connects directly with the street, so that travel can pass from either of the three streets of said subdivision along blocks 1 and 6 upon said strip without crossing any line or lines upon said plat, which would indicate an intention on the part of the platlor, we think, to connect said strip at each street intersection in said subdivision, and to indicate that said strip had been left open as an alley, as plainly as though the strip had been marked with the word "alley" upon the plat. We therefore conclude that the strip in question was designated upon the face of the plat as an alley. We take it there is no difference between the rule applicable to the dedication of an alley and that applicable to the dedication of a street, and it was so held in *VanWitsen v. Gutman*, 79 Md. 405, where, at page 405 of the opinion, the court said: "It is thought that no one will suppose that there can be any difference between the modes of dedicating a public alley and a public street."

In numerous cases in this court it has been held that in order to show an intention to dedicate a strip of land for the use of the public as a street it is not essential that the strip be designated on the plat as a street, if, upon consideration of the entire plat, there is manifested an intention to dedicate the strip as a street. In *Thompson v. Maloney*, 199 Ill. 276, it was said, on page 284: "A survey and plat, alone, are sufficient to establish a dedication, if it is evi-

dent from the face of the plat it was the intention of the proprietor to set apart certain grounds for public use.—*Smith v. Town of Flora*, 64 Ill. 93; *Godfrey v. City of Alton*, 12 id. 29; *Maywood Co. v. Village of Maywood*, 118 id. 61." In Elliott on Roads and Streets (2d ed. sec. 18,) it is said: "Where a plat of a town or city is made and recorded and lots are designated thereon, with spaces left which fairly indicate that they are set apart to the public, the spaces thus indicated are presumptively streets." In *Ingraham v. Brown*, 231 Ill. 256, it was said, on page 259: "The strip runs across the entire subdivision, and while not named upon the plat as a street, it is marked upon its margin with the figures '138,' and the surveyor, in his certificate attached to said plat, certifies that 'all measurements are taken in feet and parts of a foot, and the several sizes of the lots and blocks and widths of streets and alleys are marked on their margins, as shown upon the plat.' We are unable to understand why the figures '138' were placed upon the margin of said strip, as platted, if it was not the intention of the surveyor to indicate upon the plat, by such figures, the width of said strip and that it was set apart as a public street. In order to show an intention to dedicate said strip to the use of the public as a street it was not necessary that the strip be named as a street, as such intention may be established in any conceivable way by which it may be made manifest that it was intended to set said strip aside as a public street. 'A survey and plat, alone, are sufficient to establish a dedication, if it is evident from the face of the plat it was the intention of the proprietor to set apart certain grounds for public use.' (*Thompson v. Maloney*, *supra*.) 'Where a plat of a town or city is made and recorded, and lots are designated thereon, with spaces left which fairly indicate that they are set apart to the public, the spaces thus indicated are presumptively streets.'—Elliott on Roads and Streets, (2d ed.) sec. 18."

We are of the opinion that by the plat an offer to dedicate said strip to the public as an alley was made, and the only remaining question to be determined is, does the record show an acceptance of the offer to dedicate the strip before the offer of dedication was withdrawn? If the plat was a statutory plat the offer could only be withdrawn by a vacation of the plat under the statute, but if it was a common law plat the offer of dedication might be otherwise withdrawn before acceptance. The evidence shows that the streets of the subdivision have been improved by the city by paving, constructing sidewalks, putting in sewers, placing lamp-posts, etc., in the streets. It is urged, however, that this particular strip had not been so improved. This is true to a large extent, as the land was open and there was but little occasion to travel upon this strip; but it was not necessary that all the streets and alleys of the subdivision should be improved at once and utilized by the city or be lost to the city. An acceptance may be express, as by some positive act of the municipality evidenced by an ordinance or resolution, or an acceptance may be implied from the acts of the city or the public, as by making improvements or by travel; and where it clearly appears that the principal streets and alleys of a subdivision have been accepted by the municipality, the presumption then obtains that all the streets and alleys of the subdivision have been accepted, unless there is something which shows the acceptance to have been limited, and there is no proof in this record that the city declined to accept any portion of the plat, and that being true, the acceptance of a part was an acceptance of the whole plat. In *Village of Lee v. Harris*, 206 Ill. 428, it was said, on page 435: "It is insisted that an acceptance of some of the streets and alleys of a plat does not constitute an acceptance of the whole, and that proof of the acceptance of a part is not sufficient to vest the village with right to the use, possession and control of all the streets and alleys shown on a plat. We do not so un-

derstand the law, but, on the contrary, hold the true rule and doctrine to be, that an acceptance by a city or village of some of the streets and alleys appearing on a plat is an acceptance of the entire system of streets and alleys so appearing, unless the intention to limit the acceptance is shown." And it is further said in that case: "The immediate opening and use, by the public, of all the streets in ground laid out and platted into lots, for their entire length, or an immediate formal acceptance by some competent public authority, is not necessary to give effect to the dedication of land to the public use, of a street, by the making of a town plat and the selling of lots with reference to the plat. The public authorities must be allowed a reasonable time for opening and improving public streets, as their resources and the public necessity may allow and require." In *Village of Augusta v. Tyner*, 197 Ill. 242, it was said, on page 246: "It is true that a street may be accepted in part and the remainder rejected, if it is proved that such was the intention of the public authorities. An acceptance of some of the streets named in a plat will not constitute an acceptance of the whole, if it is shown that there was an intention to limit the acceptance." The record further shows that on two occasions,—first in 1903 and again in 1910,—the city recognized the legal existence of this alley by ordinances which were passed by the city council, one of which granted to one of the appellants the right to lay railroad tracks across the said strip to connect its property with the right of way of the railroad company. In *People v. Johnson*, 237 Ill. 237, it was said, on page 241: "An express acceptance may be shown by some order, resolution or action of the public authorities made and entered of record." And in *Michigan Central Railroad Co. v. Bay City*, 129 Mich. 264, (88 N. W. Rep. 638): "A resolution of the common council authorizing the construction of a railroad through land dedicated to the city as a street is effective as the acceptance by the city of an offer to dedi-

cate." To the same effect is the case of *Schaefer v. Selvage*, (Ky.) 41 S. W. Rep. 569.

There is ample evidence in this record to show an acceptance of the strip in question by the city as a public alley before the same was conveyed by Kerr to the appellants, and the attempt on their part to appropriate said strip by fencing the same in with their lots was without avail. The superior court therefore properly held the appellants were not entitled to an injunction restraining the city from keeping said strip open as a public alley.

Finding no reversible error in this record the decree of the superior court will be affirmed.

Decree affirmed.

GEORGE PRICE, Appellee, vs. THE DRAINAGE COMMISSIONERS OF UNION DISTRICT NO. 1, Appellant.

Opinion filed December 21, 1911—Rehearing denied Feb. 8, 1912.

1. DRAINAGE—*effect of construction of a ditch and branches by voluntary action.* Where a drainage ditch and branches are constructed by voluntary action of the land owners interested, there is an implied dedication by each of the several owners in favor of the others of an easement over his land for a ditch of such size and character as is assented to by the voluntary action of parties.

2. SAME—*district organized under section 76 of Farm Drainage act must pay for additional land taken.* The existence of the easement arising from the voluntary action of land owners in constructing ditches and drains does not authorize a drainage district subsequently organized out of the territory, under section 76 of the Farm Drainage act, to appropriate additional land for enlarging and repairing the ditches without the consent of the owner of the land or without paying him just compensation for the additional land taken or damaged.

3. SAME—*measure of damages where district organized under section 76 of the Farm Drainage act takes additional land.* Where a district organized under section 76 of the Farm Drainage act takes and damages additional land for enlarging and repairing the ditches without the consent of the land owner and without condemning the land, the land owner must recover in one action all

damages, both present and prospective, and the measure of such damages is the difference between the fair cash value of his farm before the improvement of the ditch and its fair cash value after the work was completed.

APPEAL from the Circuit Court of Vermilion county; the Hon. MORTON W. THOMPSON, Judge, presiding.

SWALLOW & SWALLOW, for appellant.

ACTON & ACTON, for appellee.

MR. JUSTICE VICKERS delivered the opinion of the court:

Appellee, George Price, brought an action of trespass against the drainage commissioners of Union Drainage District No. 1, towns of Vance and Catlin, in Vermilion county, and recovered a judgment for \$500, and the drainage district has removed the case to this court by appeal, basing the right of an appeal direct to this court on the ground that the constitutionality of a statute is involved. No question is raised as to the jurisdiction of this court.

The controversy arises out of the following facts: Appellee is the owner of 240 acres of farm land, a part of which is in Union Drainage District No. 1. He and other persons owning adjoining lands constructed, by voluntary agreement, a ditch and branches across the land of appellee and adjoining lands in order to make a combined system of drainage for the mutual benefit of the several land owners. Said ditch and its branches constituted a system of drainage by user. The main ditch as originally constructed across the lands of appellee was from 10 to 12 feet wide for a distance of 1350 feet, and for 750 feet it was from 10 to 100 feet wide. In December, 1910, some of the land owners in this system of drainage concluded that the original ditch was insufficient and that it should be widened and deepened to afford complete drainage. Appellee declined to make the improvements proposed, and thereupon certain

persons owning parts of the line of ditch petitioned for the formation of a drainage district, to include the lands interested in maintaining the ditches, under section 76 of the Farm Drainage act. The appellant district was organized and thereafter entered upon appellee's lands with a dredge boat and enlarged the old ditch so that it was from 22 to 25 feet wide for a distance of 1350 feet across appellee's land and 25 feet wide the remaining 750 feet. The dirt and clay removed from the ditch were thrown on both sides of the ditch, forming spoil banks from 3 to 3½ feet high and 28 feet wide on one side and 29 feet on the other. The appropriation of appellee's land for the improvement and enlargement of this ditch was without any condemnation, and this suit is brought to recover appellee's damages for the additional land taken for and that damaged by the improvement. The case was tried before the court without a jury, and, by appropriate propositions of law submitted, the construction and validity of section 76 of the Farm Drainage act as bearing upon appellee's right to recover, and the proper measure of his damages in case such right exists, are preserved for review in this court.

Appellant contends that where adjoining land owners by voluntary action construct a ditch for the purpose of making a combined system of drainage, such voluntary action on the part of the several parties interested operates as a dedication for such purpose of as much land as is reasonably necessary for such ditch and any additional land adjacent to said ditch that may be necessary for the repair and enlargement of such ditch, and insists that such contention is sustained by section 76 of the Farm Drainage act when properly construed. Appellee answers this contention by the argument that to so construe said section 76 as to authorize the drainage district to take and damage appellee's lands for the enlargement of this ditch would render said section unconstitutional, in that it would permit the taking and damaging of private property for public use

without just compensation, and that therefore said section 76 should be so construed as to avoid the constitutional objection, if such construction is possible.

Section 76 of the Farm Drainage act is as follows: "Where two or more parties owning adjoining lands which require a system of combined drainage, have by voluntary action constructed ditches which form a continuous line, or line and branches, the several parties shall be liable for their just proportion of such repairs and improvements as may be needed therefor, the amount to be determined as near as may be on the same principle as if these ditches were in an organized district. Whenever such repairs and improvements are not made by voluntary agreement, any one or more owning parts of such ditch shall be competent to petition for the formation of a drainage district to include the lands interested in maintaining these ditches. The petitioner or petitioners for the formation of such district must show to the satisfaction of the court that his or their land is damaged through the lack of proper repairs or improvements to said ditch or drain. The form of procedure and the conditions heretofore prescribed in this act shall be observed as near as practicable; but the ditches shall be taken as a dedication of the right of way, and their construction and joining as the consent of the several parties to be united in a drainage district. These ditches, if open, shall be made tile drains when practicable." (Hurd's Stat. 1909, p. 909.)

Under this section of the statute the construction of the original ditch is the result of the voluntary action of the parties interested, and we have no doubt that there is an implied dedication by each of the several parties of an easement over his land, in favor of the other interested parties, for a ditch of such size and character as is assented to by the voluntary action of the parties. Such, in effect, was the holding of this court in *Funston v. Hoffman*, 232 Ill. 360, where it was held that a right of action existed in fa-

vor of a tenant of one of the land owners against another land owner for damages resulting to crops from wrongfully taking up a tile drain that had been laid by the voluntary agreement of the parties under the statute of 1889. On page 366 of the opinion in that case this court said: "We think all of the decisions that have been rendered construing this statute tend to uphold the conclusion that an owner of land who has given his consent to the construction of a ditch, as did appellant in this case, is estopped from denying that there is a perpetual easement on his land on the ground that some other owner of land in such a system of drains did not legally consent thereto." The existence of the easement in favor of the several parties interested in the combined system of drainage arises out of the original contract or joint action of the land owners interested, but we cannot assent to appellant's contention that the existence of such easement, when the same passes to a drainage district formed under section 76, will authorize such district to enter upon the lands of the several parties interested and appropriate additional adjoining lands for the purpose of enlarging and improving such ditches without making just compensation for such additional lands as may be taken or damaged. It would be a harsh rule to say that a land owner who consented to the construction of a tile drain across his land for the mutual benefit of his land and that of his neighbors, thereby granted a perpetual easement to a drainage district subsequently formed to make an open ditch of any desired width along the line of such tile drain. To so construe section 76 would undoubtedly render said section unconstitutional. There was no error in holding that appellant was liable for the additional lands taken and damaged by the enlargement of this ditch.

The only remaining question discussed by appellant is that the court erred in the measure of damages applied. The court below assessed the damages of appellee at \$500. The evidence shows that the additional land taken for the

ditch and that covered with the clay from the ditch is about three and a quarter acres, which was valued by the various witnesses at from \$175 to \$200 per acre. If appellee is entitled to recover the value of the land taken for the ditch and spoil banks the amount of damages is well within the evidence. The witnesses testify that the lands occupied by the spoil banks may in the course of time be reclaimed by spreading the spoil banks and cultivating until the clay becomes so intermixed with the soil that the land can again be made useful. The expense of spreading the spoil banks is estimated at from \$50 to \$100, and the length of time that it would require to restore the spoil banks to a tillable condition, and the extent of their value thereafter, are questions about which the opinions of the witnesses differ. Allowing appellee only for the land embraced within the banks of the open ditch, and assuming that the spoil banks are only damaged to the extent of the expense of spreading the clay, the damages allowed are excessive; but we think the measure of appellee's damages is the difference between the fair cash value of the farm as it was before the improvement of the ditch and its fair cash value after the work was completed, and in this view the rule adopted by the trial court was correct. The improvement is in its nature a permanent structure, and appellee can only have one recovery, which must include all his damages, both present and prospective, and under these circumstances the damages cannot be held excessive. The court did not err in respect to the measure of appellee's damages. *Chicago and Iowa Railroad Co. v. Baker*, 73 Ill. 316; *Chicago and Pacific Railroad Co. v. Stein*, 75 id. 41.

There being no error in the record the judgment of the circuit court of Vermilion county is affirmed.

Judgment affirmed.

JOSEPH VERDUN *et al.* Appellees, *vs.* AGNES H. BARR *et al.*
Appellants.

Opinion filed December 21, 1911—Rehearing denied Feb. 8, 1912.

1. JUDICIAL SALES—*when the return of a summons is sufficient though full names are not given.* A sheriff's return of a summons is sufficient even though it does not give the full names of the persons served but only their surnames and initials, where the return shows it was served on the persons named in the summons, in which their full names were given.

2. SAME—*provision of statute fixing time for filing executor's report of sale is mandatory.* The provision of paragraph 108 of the Administration act requiring an executor or administrator who has sold land to pay debts to file his report of sale on or before the first day of the term of court next succeeding the sale is mandatory, but a failure to file the report at that time does not necessarily render the sale void.

3. SAME—*object of provision fixing time for filing report of sale.* The object of the statutory provision requiring an executor or administrator to file his report of sale on or before the first day of the term of court next succeeding the sale is to avoid an approval of the sale without notice to the parties interested, and even if the report is not filed until a subsequent date it may be approved by the court after due notice to the parties interested.

4. SAME—*when notice of filing report of sale will be presumed.* Where an executor's report of sale was not filed until after the first day of the term of court next succeeding the sale, but there was ample time between the filing of the report and its approval to have given notice of the filing of the report to the parties interested, it will be presumed, when the sale is attacked collaterally after a lapse of more than twenty years, that such notice was given even though no notice appears in the record.

5. SAME—*fact that deeds were delivered to purchasers before sale was approved is not fatal.* The fact that the deeds to the purchasers at an executor's sale were delivered before the sale was approved by the court is an irregularity which is cured by the subsequent approval of the sale, and which cannot be raised, after the lapse of many years, for the purpose of defeating the titles of innocent purchasers who have long been in possession of the lands.

6. SAME—*presumptions are in favor of jurisdiction when judicial sale is collaterally attacked.* A bill to set aside an executor's sale and for partition is a collateral attack upon the proceeding in

the county court under which the sale was made, and in such case nothing is presumed to be out of the jurisdiction of the county court except that which specially appears to be so.

7. SAME—*sale by executor for his own benefit is not void but voidable.* The fact that the purchaser at an executor's sale may have purchased for the executor does not render the sale void but only voidable, and if proceedings to set aside the sale are not instituted in apt time by those having the right to contest the same a ratification of the sale will be presumed, and they may be denied relief even though no statute of limitations has run.

8. SAME—*when executor's sale will not be set aside after lapse of many years.* An executor's sale, even though it may have been made indirectly to himself, will not be set aside, after the lapse of twenty-five years, at the suit of heirs who were minors at the time of the sale, where they were served with summons in the proceedings for the sale, which were shown in their entirety in the public records, and where the youngest child was thirty years of age at the time of the filing of the bill, which gave no excuse for the delay other than that the complainants were not advised of their rights in the land.

9. SAME—*when fact that an action for possession could not be brought does not excuse delay.* Remainder-men who were minors at the time of a sale of the land by the life tenant, as executor, have a right, at any time within three years after attaining their majority, to file a bill to set aside the sale upon the ground that it was made by the executor indirectly to himself; and their failure to attack the sale until the youngest child is thirty years old is not excused by the fact that the life tenant was living during that time, so that they could not maintain an action for possession of the land. (*Mason v. Odum*, 210 Ill. 471, followed.)

APPEAL from the Circuit Court of Livingston county; the Hon. GEORGE W. PATTON, Judge, presiding.

James Henry, a bachelor, departed this life testate, in Livingston county, on April 12, 1879, leaving Alexander Cupples, a nephew, him surviving, as his sole heir-at-law. He left a considerable amount of personal property and died seized of 680 acres of farming land situated in said county, described as follows: The north-east quarter of the south-west quarter, the south half of the south-west quarter and the south-east quarter of section 8, the south-

west quarter of section 17 and the north-west quarter of section 20, all in township 30, range 6, east of the third principal meridian; also the north half of the north-east quarter of section 13, township 30, range 5, east of the third principal meridian. These lands were encumbered by mortgages to the amount of \$9300. His will was admitted to probate in the county court of Livingston county, and Alexander Cupples, who was nominated as executor without bond, duly qualified. The second and third provisions of the will read as follows:

*"Second—*After the payment of all the debts aforesaid, I give, devise and bequeath all the residue and remainder of all my property, both real and personal, wherever the same may be situated, to my nephew, Alexander Cupples, to hold and enjoy for and during his natural life.

*"Third—*All the property above bequeathed and devised I give and devise to the children of the said Alexander Cupples and to the legal issue of any deceased child or children of said Cupples, by way of representation of such child or children, and to the heirs and assigns of such children forever, to have and to hold the same in equal parts from and after the death of their father, the said Alexander Cupples. It being my express intention to give to said Alexander Cupples a life estate in my property aforesaid, and the remainder, after his death, to the legal heirs of his body."

Alexander Cupples, at the time of the death of James Henry, had by his wife, Alice, the following named children: Agnes H., aged sixteen years; Franklin H., aged fourteen years; Jennie, aged thirteen years; Alexander, aged eleven years; James, aged nine years; William, aged six years; Alice, aged four years; Samuel, aged two years. The executor, subsequent to his appointment, filed a report showing that the personal property of said estate was exhausted and there was a deficiency of personal property to pay debts of about \$800, and he thereupon filed a petition and obtained an order at the June term, 1881, of the county

court of Livingston county, to sell the real estate of the testator, or as much thereof as was necessary to pay such deficiency and costs. The sale was made in the month of July, 1881. The north half of the north-west quarter of section 13 was sold to George W. Newcomb for \$580, subject to a mortgage for \$1184.70 on said land, and the balance of the real estate, 600 acres, was sold to Ben A. Harding for \$1892.50, subject to mortgages thereon aggregating \$7407.50. The first day of the following term of the county court,—that is, the August term,—was August 15, 1881, and the report of the sale of said real estate was filed by the executor August 24, 1881, and was approved by the county court September 1, 1881, and deeds were made by the executor to the respective purchasers, the deed to Newcomb bearing date July 30, 1881, and the deed to Harding bearing date July 3, 1881. The deed to Newcomb was acknowledged August 10 and recorded August 17, and the deed to Harding was acknowledged August 24 and recorded September 9, 1881. Newcomb conveyed on January 5, 1882, the 80 acres purchased by him to William Flanigan, who has been in possession of the said premises since that date. Harding, on March 10, 1882, conveyed the north-west quarter of section 20 to Alexander Cupples, the executor, who on February 27, 1883, conveyed the east half of the north-west quarter of section 20, and on April 24, 1891, the west half of the north-west quarter of section 20, to J. J. Kelly, and thereafter Joseph Verdun purchased of Kelly the said north-west quarter of section 20, and has held the same by *mesne* conveyance from Harding since February 27, 1883. On March 2, 1882, Harding conveyed the south-west quarter of section 17 to Alexander Cupples, and Alexander Cupples, on April 3, 1893, conveyed said south-west quarter of section 17 to Dennis Kehoe, who on September 25, 1900, conveyed the same to Michael Kehoe, who has since then been, and now is, in possession of said south-west quarter

of section 17, holding the same by *mesne* conveyance from Harding. On March 2, 1882, Harding conveyed the south half of the south-west quarter and the north-east quarter of the south-west quarter of section 8 to Charles D. Chalfant, and on March 3, 1885, Chalfant conveyed the same to Samuel Sterns, and the same is now held by *mesne* conveyance from Harding by Martha B. Grundler. On September 6, 1881, Harding conveyed the south-east quarter of section 8 to William W. Wassom, with the exception of certain portions which had been set aside as a cemetery and which had been platted into town lots, and Wassom has been in possession thereof since that date.

On April 12, 1907, Joseph Verdun filed a bill in the circuit court of Livingston county against Agnes H. Barr, (*nee* Cupples,) Alexander Cupples, James Cupples and William Cupples to quiet his title to the north-west quarter of section 20. Agnes H. Barr, Alexander, James and William Cupples filed a cross-bill, claiming to be the owners of the said real estate, and answers and replications were filed. On the 18th day of June, 1907, Agnes H. Barr, Alexander Cupples, James Cupples and William Cupples filed their original bill in the circuit court of Livingston county for the partition among themselves and the children of Jennie Crawford (*nee* Cupples) and Franklin H. Cupples, both of whom were deceased, of all the lands of which James Henry died seized, making Joseph Verdun, William Flanigan, Michael Kehoe, Martha B. Grundler, William W. Wassom and Alexander Cupples, as executor of James Henry, deceased, and other parties, defendant, and Verdun, Kehoe, Grundler, Wassom and Flanigan filed a cross-bill to establish title to the said premises in themselves, respectively. Answers and replications were filed and the causes were consolidated and were referred to the master to take the evidence and report his conclusions. The master, after taking the evidence, filed a report recommending that the relief prayed for in the original bill of Joseph Verdun,

and in the cross-bill of Verdun, Flanigan, Kehoe, Wassom and Grundler, be granted. The court, after overruling exceptions to the master's report, entered a decree establishing the title of Verdun, Flanigan, Kehoe, Wassom and Grundler to the portions of the lands which had formerly belonged to James Henry and which were then in the possession of said respective parties in severalty. From the decree so entered in said consolidated case, Agnes H. Barr, James Cupples, Alexander Cupples and William Cupples, and the children of Jennie Crawford and Franklin H. Cupples, have prosecuted an appeal to this court. Alice and Samuel Cupples died during their minority.

CHESTER FIREBAUGH, and BUTTERS & ARMSTRONG, for appellants.

BOYS, OSBORN & GRIGGS, C. J. AHERN, A. C. NORTON, H. G. GREENEBAUM, R. S. MCILDUFF, and B. R. THOMPSON, for appellees.

Mr. JUSTICE HAND delivered the opinion of the court:

The appellants contend that they were not divested of the title to the lands devised to them in fee by their grand-uncle, James Henry, by the sales made to George W. Newcomb and Ben A. Harding by Alexander Cupples, as executor, by virtue of the order of the county court of Livingston county, for the following reasons: First, the return of the sheriff on the summons issued in the matter of the application for an order to sell real estate to pay debts was insufficient to give the county court of Livingston county jurisdiction of their persons, and that, they being minors at the time the order of sale was entered, the county court was without jurisdiction to enter the order of sale; second, that the report of sale of said real estate was not filed in the office of the clerk of said county court on or before the first day of the next term of court after the

sales were made, and that the sale of said lands made by said executor by virtue of the order of the county court, and the execution of the deeds to the purchasers at such sale, did not have the effect to divest them of their title to said lands; and third, that by virtue of the provisions of the will of James Henry, deceased, their father, Alexander Cupples, was given a life estate in said real estate and they were given the fee; that the sales by said executor to Newcomb and to Harding were not made in good faith, but were made to himself through Newcomb and Harding, and for the sole purpose of fraudulently depriving the appellants and their brothers and sisters of the fee title in said premises and investing Alexander Cupples with the same.

The return on the summons was in the following form :

"I have duly served the within by reading the same to the within named, A. H. Cupples, J. Cupples, A. Cupples, F. H. Cupples, A. Cupples, J. Cupples, S. Cupples, W. Cupples, June 2nd, '81, as I am herein commanded.

J. A. HUNTER, Sheriff."

In *Simms v. Klein*, Breese, 371, the sheriff's return showed that summons had been served upon I. R. Simms instead of Ignatius R. Simms, and it was held a good return; and in *Bancroft v. Speer*, 24 Ill. 228, the return was in the following form: "Served the within by reading the same to and in the hearing of S. B. Bancroft, June 21, 1858," and it was held an insufficient return, as it did not show the summons was served on the defendant. It was, however, said: "Had he returned that he had served it on the within named defendant, or employed any language from which we could have seen that such was the fact, the return would have been sufficient." Here, while the full names of the persons served were not given, the return showed it was served upon the persons named in the summons where their full names were given. It is therefore apparent from the return the persons served were the persons named in the summons, and that was sufficient. The return, under the authorities heretofore cited, was ample

to confer jurisdiction over the persons of the appellants in the proceedings in the county court to sell said real estate.

The statute (Hurd's Stat. 1909, chap. 3, par. 108,) contemplates that an executor or administrator, where real estate is sold under order of court to pay debts, shall file a report of the sale on or before the first day of the term next succeeding the sale, and this provision of the statute cannot, as we think, be held, as is contended by the appellees, to be merely directory. The object of the provision was to fix a time at which the heir, devisee or creditor, or other person interested, might, without notice, appear and object to the confirmation of a sale of real estate to pay debts. We do not understand, however, that the time when the statute provides the report of sale shall be filed in the clerk's office is so far jurisdictional that the sale would be held to have been abandoned and the county court to have lost jurisdiction of the subject matter of the sale if the report was not filed in the clerk's office on or before the first day of the term of court succeeding the date of sale. Clearly, an executor or administrator could not avoid a sale by a failure or refusal to file a report of the sale in time. We are of the opinion that as the object of the statute is to avoid the approval of a report of the sale of real estate to pay debts without giving the parties in interest an opportunity to be heard, the report may be filed subsequent to the first day of the term of court succeeding the date of sale and approved by the court upon notice to the parties in interest of the filing of the report of sale, as such notice would serve every purpose that the filing of the report would serve if filed prior to or upon the first day of the term succeeding the sale. It appears that the sale was had on the 30th of July, that the first day of the succeeding term was August 15, that the report was not filed until August 24, and that it was approved on the first day of September. There was ample time to give notice between the date of sale and the first day of September that the re-

port would be filed, and that the court would be asked, on the date fixed in the notice, to approve said sale. While no notice appears in the record, we think after a lapse of a period of twenty-five years, and when the approval of said sale is attacked in a collateral proceeding, the presumption must obtain that due and proper notice was given of the filing of the report of sale before the approval of the sale by the court on September 1.

It is said the deeds to Newcomb and Harding were executed and delivered before the sales were approved. This appears to be true. That, however, was a mere irregularity, which we think was cured by the subsequent approval of the sales. As we view the matter, the approval of the sales, and not the filing of the report of sale, is the important matter, and that mere irregularities in the sale or in the time when the deeds were actually delivered cannot be raised, after the lapse of many years, against innocent parties who have been in possession of the lands sold, for the purpose of defeating their titles. In *Bradley v. Drone*, 187 Ill. 175, it was held a bill for partition and to set aside an administrator's sale was a collateral attack upon the proceedings of the county court under which the sale was made, and that in a collateral attack upon the proceedings of the county court nothing is presumed to be out of its jurisdiction except that which especially appears to be so, and in that case, in order to sustain the sale, the presumption obtained that a second summons had been issued where the first summons was not sufficient to confer jurisdiction. We are of the opinion in this proceeding the presumption obtains that the parties had notice of the filing and approving of the report of the sales made to Newcomb and Harding, and that the approval of said sales by the county court cannot be set aside, as against innocent third parties, at this late day in a collateral proceeding, and that the approval of the sales by the county court validated the deeds to the real estate before that date delivered to the purchasers.

The evidence in this record shows, we think, the sale to Newcomb was made in good faith. We are, however, impressed with the view that the sale to Harding was made for the benefit, at least in part, of the executor, Alexander Cupples. The accounts of the executor were apparently manipulated in order to create a deficiency of personal estate upon which to base an application for the sale of real estate, and the purchaser of the 600 acres was the son of the attorney for the executor and was a young man without means, and he afterwards conveyed to Cupples, or such persons as Cupples directed, substantially all the land which he purchased. If, however, it be conceded that the sale was wrongfully made to Harding for the benefit of Cupples it was not a void but only a voidable sale, and one which could be set aside by the heir, devisee or creditor, if action were taken within a reasonable time. The sale was made in 1881 and this bill was filed in 1907, a period of more than twenty-five years having intervened between the date of the sale and the date of the filing of the bill. During that time the real estate has passed into the hands of innocent third parties and has greatly increased in value, and it would now and at this late date be unjust and inequitable to set aside the sale to Harding for mere irregularities in the sale, or for other reasons which the appellants could have taken advantage of upon their arriving at their majority or within a reasonable time thereafter. At the time the bill for partition was filed Agnes H. Barr was forty years of age, Alexander Cupples was thirty-five years of age, James Cupples was thirty-three years of age and William Cupples thirty years of age, and more than twenty-five years had elapsed subsequent to the date of the sale. No excuse is made for this great delay other than that appellants were not advised of their rights in said lands. They had all been served with summons in the application for the order of sale and the public records of Livingston county showed the entire transaction. We are therefore

constrained to hold, in view of all of the facts shown by this record, that the title of the present claimants to said lands ought not now be disturbed by reason of the irregularities which occurred in connection with the sale, or the fraud of Alexander Cupples and Harding in buying in the land at the sale for the benefit of the executor. It has been repeatedly held by this court that the fact that the purchaser at an executor's or administrator's sale purchased for the executor or administrator does not render the sale absolutely void but only voidable, and if proceedings are not instituted in apt time to set the sale aside by those having the right to contest the same, a ratification of the sale by them will be presumed, (*Sloan v. Graham*, 85 Ill. 26; *Mason v. Odum*, 210 id. 471; *Brinkerhoff v. Brinkerhoff*, 226 id. 550;) and that relief will be denied under such circumstances even though no statute of limitations has run. *Mason v. Odum*, *supra*.

It is urged by the appellants that the life tenant, Alexander Cupples, did not depart this life until subsequent to the commencement of this litigation, and that during the time which has intervened between the date of the sale of the said real estate and his death, which occurred on June 4, 1909, they could not maintain an action to recover the possession of said land. Under the authority of *Weigel v. Green*, 218 Ill. 227, and kindred cases, an action by the remainder-man cannot be maintained to obtain possession of real estate during the existence of the life estate. We do not think, however, that the fact that the appellants could not maintain an action to obtain possession of this land prevented them from instituting legal proceedings, upon their attaining their majority, to set aside the sale to Harding. They could, at any time within three years after they attained their majority, being the owners in fee of said real estate, have filed a bill in equity to have the sale set aside. This they have neglected to do, and now, although there is no statute of limitations which can be ap-

plied against them, clearly by reason of their *laches* they are barred of relief. The case of *Mason v. Odum, supra*, is very much like the case at bar, and in principle, we think, controls this case.

We have examined this record with care and are of the opinion the decree of the circuit court should be affirmed, which will accordingly be done.

Decree affirmed.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, *vs.*
GUSTAV A. BECKER, Admr., Appellant.

Opinion filed December 21, 1911—Rehearing denied Feb. 8, 1912.

1. FORMER RECOVERY—*rule as to admitting parol proof where general judgment is entered on several demands.* Where several distinct items are declared upon in an action of debt and the judgment is general, the presumption, in the absence of anything in the record to the contrary, is that each item was included in the judgment; but such presumption may be overcome by parol proof showing that certain of the items were not offered in evidence and were not included in the judgment.

2. SAME—*when former recovery is not a bar.* Satisfaction of a judgment against a State Auditor's bondsmen, entered in an action of debt declaring upon six separate warrants drawn by the State Auditor in favor of himself, the State Treasurer and others, is not a bar to a recovery against the State Treasurer on the warrants drawn in his favor even though the judgment was general, where it is shown by parol proof that the warrants in favor of the State Treasurer were not offered in evidence in the former suit, and that the judgment recovered was based only upon the warrants in favor of the State Auditor.

3. SAME—*when the State Auditor and State Treasurer are not joint tortfeasors.* The State Auditor and State Treasurer are not joint tortfeasors in the matter of wrongfully drawing and paying warrants on the State treasury, and the only sense in which they and their bondsmen are jointly liable, the one with the other, is, that there can be but one satisfaction for the money or moneys wrongfully drawn from the State treasury.

FARMER and COOKE, JJ., dissenting.

APPEAL from the Circuit Court of St. Clair county; the Hon. GEORGE A. CROW, Judge, presiding.

Charles Becker was Treasurer of the State of Illinois from January 14, 1889, to January 12, 1891, and Charles W. Pavey was Auditor of Public Accounts from January 14, 1889, to January 9, 1893. During the time Pavey was Auditor he drew six warrants against, and payable out of, the moneys then in the State treasury which had been collected by the State and paid into its treasury as the cost of the State for collecting and disbursing the principal and interest upon registered bond funds. These warrants were as follows:

No.	Date.	Amount.	To whom Issued.
11062	Sept. 30, 1890	\$10,748.21	Charles W. Pavey
12320	Sept. 30, 1892	9,224.08	Charles W. Pavey
11061	Sept. 30, 1890	9,611.50	Charles Becker
1402	Jan. 19, 1891	846.10	Charles Becker
1592	Jan. 24, 1889	1,022.51	John R. Tanner
12319	Sept. 30, 1892	8,416.71	Edward S. Wilson

Said warrants were all paid out of the State treasury.

On May 1, 1908, Charles Becker being dead, the Attorney General, on behalf of the State, filed two claims against his estate in the probate court of St. Clair county, where the said estate was in the course of administration. One claim was designated as "Claim No. 1," and was based upon the warrants issued to Becker, which aggregated \$10,457.60; and the other claim was designated as "Claim No. 2," and was based upon the warrants issued to Pavey, which aggregated \$19,972.29. On October 30, 1908, claim No. 2 was dismissed, and on November 11, 1908, claim No. 1 was allowed against the estate of Becker as a sixth-class claim for \$10,457.60 and was ordered paid in the due course of administration.

On the 21st of March, 1908, the Attorney General, on behalf of the State, commenced an action of debt in the

circuit court of Jefferson county upon the official bond of Pavey, and on April 2, 1908, filed a declaration in said action upon said official bond in which he assigned six breaches, a several breach being assigned upon each of the six warrants hereinbefore described. On the 14th day of April, 1908, the circuit court of Jefferson county rendered judgment in said action of debt in favor of the State for \$19,972.29 damages, in the following form: "And this cause coming on now to be heard, it is ordered that the said defendants be called, and having each been three times solemnly called in open court to answer, plead or demur, they came not, nor anyone for them, but herein make default; and the court, after hearing the evidence, considers and orders that the plaintiff, the People of the State of Illinois, have and recover of and from the said defendants, Charles W. Pavey, Williamson C. Pace, John R. Allen and Alvin Gilbert, the sum of \$19,972.29 and costs, and execution awarded therefor." This amount was fully paid and judgment was satisfied.

On February 6, 1911, the claim allowed against the estate of Becker remaining unsatisfied of record, the administrator of Becker filed what he designated as his final report in the probate court of St. Clair county, which report, among other things, contained the following statement: "He further reports that the claim allowed against said estate by this court in favor of the People of the State of Illinois in the sum of \$10,457.60 has been fully satisfied by the recovery and satisfaction of a judgment by the People of the State of Illinois against Charles W. Pavey *et al.* in the circuit court of Jefferson county, Illinois, and he asks to be discharged from any further liability on account of said claim." On March 9, 1911, the Attorney General, on behalf of the State, filed exceptions to said report in so far as it stated the claim of the State probated against the estate of said Becker had been paid by the satisfaction of the judgment recovered against Pavey. Thereafter the pro-

bate court of St. Clair county overruled the exceptions filed by the Attorney General and approved said administrator's report. An appeal was perfected by the Attorney General to the circuit court of St. Clair county, where the exceptions of the Attorney General were sustained and the judgment of the probate court was reversed, and an appeal has been prosecuted by the administrator of Becker from the judgment of the probate court to this court.

FRED B. MERRILLS, and L. D. TURNER, for appellant.

W. H. STEAD, Attorney General, (B. F. LINCOLN, of counsel,) for the People.

Mr. JUSTICE HAND delivered the opinion of the court:

The question presented upon this appeal for decision is, did the satisfaction of the judgment recovered against Pavey in the circuit court of Jefferson county operate as a satisfaction of the judgment entered against the estate of Becker in the probate court of St. Clair county? We are of the opinion it did not. The judgment of the probate court of St. Clair county was a valid adjudication against the Becker estate when rendered, and unless the warrants which formed the basis of that judgment were included in the judgment rendered by the circuit court of Jefferson county against Pavey, which was satisfied, there was no satisfaction of the judgment against the Becker estate. The six warrants were counted upon in the declaration in the suit in the circuit court of Jefferson county against Pavey, and the record of that court fails to show that any one of the said warrants was withdrawn. The judgment was general, and the presumption would obtain, we think, in the absence of extrinsic evidence, that each warrant declared on entered into the consideration of the court in making up its judgment. That presumption, however, might be overcome by parol proof showing that the warrants which formed

the basis of the judgment against the Becker estate were not offered in evidence in the Jefferson circuit court and were not included in the Pavey judgment.

The case of *Palmer v. Sanger*, 143 Ill. 34, is in point. In that case a claim was presented against an estate for \$12,745, which consisted of nine separate items, the last of which was a note secured by a mortgage on real estate. The claim was allowed for \$5891.62, and the judgment was general in form, and the records of the county court did not show that any item or items of the account had been withdrawn from the consideration of the court. Afterwards a bill was filed to foreclose the note and mortgage which had been included in the account filed in the county court, and the judgment of the county court upon the claim was offered in evidence, and it was insisted that the judgment of the county court was a bar to the foreclosure suit. The complainant in the foreclosure suit made proof, by parol, that the note secured by the mortgage then sought to be foreclosed was not offered in evidence in the county court, and that the judgment of the county court was not based, in whole or in part, upon said note, but was based entirely upon other claims mentioned in the account. The court held that as the note mentioned in the mortgage was included in the account filed in the county court and had not been withdrawn, and the judgment was general in form, it would be presumed the note was included in the probated claim, but as the parol evidence introduced in the foreclosure suit clearly showed the note was not included in the claim as allowed, the judgment of the county court was not a bar to the foreclosure suit. On page 39 of the opinion the court said: "We think the record shows *prima facie* an adjudication upon the whole indebtedness probated. The judgment is general. It nowhere appears by the record that any item in the claim filed was dismissed or withdrawn, hence presumably each item entered into the consideration of the court in making up its judgment. It does

not follow, however, that such presumption may not be overcome by parol proof showing that certain of the items were not so considered. The total indebtedness filed against Sanger's estate was not a single claim, but nine claims presented together. That some of these did not enter into the judgment of the county court is clearly shown by the amount allowed. What disposition the court made of the other items is left in doubt, and parol evidence to remove that uncertainty does not contradict the record in the sense that makes such testimony inadmissible as against a record. * * * It was competent for the complainant below to prove by parol, if she could, that item 9 of her claim against the estate of Lorenzo P. Sanger was never, in fact, passed upon by the county court of Cook county."

In *Chicago, Burlington and Quincy Railroad Co. v. Schaffer*, 124 Ill. 112, it was said, on page 121: "When a former recovery is relied on as a bar, parol evidence not contradictory of the record may, in case of such doubt, be introduced to show what was included within and investigated on the trial of the issue. If the face of the record does not show the full and true state of the controversy and the matters investigated, parol evidence must be admitted to supply what is not shown."

Mr. Greenleaf, in his work on Evidence, (14th ed. sec. 532,) says: "When a former judgment is shown by way of bar, whether by pleading or in evidence, it is competent for the plaintiff to reply that it did not relate to the same property or transaction in controversy in the action to which it is set up in bar, and the question of identity thus raised is to be determined by the jury upon the evidence adduced."

The evidence in this case shows, without contradiction, that the judgment in the Pavey case was entered, by agreement, for the face of the two warrants drawn in Pavey's own favor and collected by him from the State Treasurer, and that the warrants issued to Becker, and which form the

basis of the probate court judgment, were not offered in evidence or considered by the probate court in making up the judgment in that court. The appellant alleged in his report filed in the probate court that the Becker judgment had been paid, and it devolved upon him to sustain such allegation. This he failed to do, and the circuit court properly sustained exceptions to his report in that particular.

It is next contended the Auditor and Treasurer were joint tort feors, and as the State had accepted the amount of the Pavey judgment from Pavey and his bondsmen and released Pavey, such release worked a discharge of the Becker estate, Becker having been a joint tort feor with Pavey. The Auditor and Treasurer were not joint tort feors. (*Whittemore v. People*, 227 Ill. 453.) Their acts were not joint acts. The wrongful act of Pavey was in drawing the warrants and the wrongful act of Becker was in paying them, and whatever liability the law attached to their several acts was a distinct and separate liability, which could be enforced against them, or them and their bondsmen separately. The only sense in which they and their bondsmen were jointly liable, the one with the other, was that there could be but one satisfaction for the money or moneys wrongfully withdrawn from the State treasury, and as there will be but one satisfaction of the claim against the Becker estate if it shall be paid to the State by the administrator, the appellant is not in a position to claim that the estate has been wronged by reason of the fact that the State has forced Pavey to liquidate his liability.

Finding no reversible error in this record the judgment of the circuit court of St. Clair county will be affirmed.

Judgment affirmed.

FARMER and COOKE, JJ., dissenting.

MICHAEL CATALDO, Appellee, vs. GREGORI OSTIUSO,
Appellant.

Opinion filed December 21, 1911—Rehearing denied Feb. 8, 1912.

1. ELECTIONS—*judgment of county court on contest of primary election is final.* The only authority for contesting elections or nominations at a primary election is found in section 62 of the Primary Election act of 1910, and as such section provides that the judgment shall be final there is no right of appeal; nor is there a right to a writ of error, since an election contest is a statutory proceeding.

2. APPEALS AND ERRORS—*judgment in primary election contest is conclusive of court's jurisdiction.* The judgment of the county court in a proceeding to contest an election under the Primary Election law is conclusive of all questions involved, including the question whether the court had jurisdiction of the proceeding.

APPEAL from the County Court of Cook county; the Hon. JOHN E. OWENS, Judge, presiding.

EDWARD J. SMEJKAL, JOSEPH Z. KLENHA, and OTTO F. RING, (ADOLPH J. KRASA, of counsel,) for appellant.

CHARLES H. MITCHELL, for appellee.

Mr. JUSTICE FARMER delivered the opinion of the court:

Appellee instituted in the county court of Cook county a proceeding to contest the election by the republican party of a precinct committeeman for the ninth precinct in the nineteenth ward in the city of Chicago under the Primary Election law of 1910. Appellant and appellee were rival candidates at the primary for election to the office of precinct committeeman in said precinct. The judges of election declared that there was a tie vote; that each of said candidates had received an equal number of votes for said office, and they proceeded to cast lots to determine which of them should be declared elected precinct committeeman. This resulted in favor of appellant, and he was declared

duly elected precinct committeeman. Appellee thereupon filed a petition in the county court to contest the election of appellant. The petition alleged that the return of the votes for precinct committeeman by the judges of election was false; that appellee received twenty-nine votes and appellant received only twenty-five votes, and that the judges and clerks of the election wrongfully and unlawfully declared the vote a tie. Appellant filed a plea to the petition, denominated in his brief "a plea to the disability of appellee." He also filed a motion to dismiss the petition for want of jurisdiction in the county court. This motion was overruled, and he thereupon, by leave of court, withdrew his plea and filed a demurrer to the petition. The demurrer was overruled, and, appellant electing to stand by his demurrer, a decree was entered by the county court in favor of appellee. From that decree the appellant has prosecuted this appeal.

The only question raised by the appellant is whether the county court had jurisdiction to entertain a petition to contest the election of a precinct committeeman elected under the Primary Election law of 1910. Appellant contends that it had no such jurisdiction. The authority for contesting elections or nominations made at a primary election is found in section 62 of the Primary Election law of 1910. That section provides for the procedure in the county court in contests authorized therein, and further provides, "the judgment of the court shall be final." An appeal is not only not authorized, but is prohibited by making the judgment of the county court final, and as an election contest is a statutory proceeding, not according to the course of the common law, no writ of error would lie, and the judgment of the county court is not subject to be reviewed by a higher court. *Saylor v. Duel*, 236 Ill. 429.

The appeal is therefore dismissed.

Appeal dismissed.

THE PEOPLE *ex rel.* Edward G. Zilm, County Collector,
Appellee, *vs.* ALIDA M. CONWAY, Appellant.

Opinion filed Dec. 21, '11—Leave to file petition denied Feb. 9, '12.

1. SPECIAL ASSESSMENTS—*effect of striking objections to application for judgment from files.* Striking the objections to an application for judgment and order of sale from the files and refusing to hear evidence in support of them amounts to holding that the facts stated therein constitute no legal objection to the application for judgment.

2. SAME—*section 84 of Local Improvement act confers upon court the power formerly possessed by improvement board.* Section 84 of the Local Improvement act confers upon the court wherein the assessment was confirmed the power to bind the city and the property owners by accepting the improvement as being constructed in accordance with the ordinance.

3. SAME—*a hearing must be had under section 84 after notice given.* Under section 84 of the Local Improvement act a hearing must be had upon the improvement board's certificate after notice given, and the finding of the court as to the truth of the certificate is not subject to review.

4. SAME—*assessment is not delinquent until after improvement board's certificate of completion is filed.* A special assessment is not delinquent until after the improvement board's certificate has been filed, and an application for judgment and order of sale can not be maintained until the provisions of section 84 have been complied with.

5. SAME—*court must find that improvement does or does not comply with ordinance.* Under section 84 of the Local Improvement act the court, upon the hearing on the improvement board's certificate of completion, must find that the improvement does or does not conform to the requirements of the ordinance, and if it finds the statements of the certificate are not true, the board may file additional or supplemental petitions until the court is satisfied of the truth of the certificate.

6. SAME—*court has no power to accept bond of contractor on the hearing under section 84.* If the court, on the hearing under section 84 of the Local Improvement act, finds against the allegations of the certificate, it has no power to accept a bond of the contractor to do the work required to make the improvement conform to the ordinance, as the object of section 84 is to require performance before acceptance.

7. *SAME*—when an objector may show, on application for sale, that improvement does not conform to ordinance. If the court, on the hearing under section 84, finds against the allegations of the certificate of completion but approves the certificate upon accepting a bond of the contractor to complete the work but without any further steps being taken by the improvement board or any finding that the improvement has been completed in accordance with the ordinance, property owners who filed objections on the hearing may show, on application for judgment and order of sale, that the contractor did not complete the improvement in accordance with the ordinance.

APPEAL from the County Court of LaSalle county; the Hon. W. H. HINEBAUGH, Judge, presiding.

JAMES J. CONWAY, for appellant.

RECTOR C. HITT, for appellee.

Mr. JUSTICE DUNN delivered the opinion of the court:

To an application for judgment against the property of the appellant for the delinquent first installment of a special assessment for a brick pavement the appellant filed objections, which, upon motion of the attorney for the People, were stricken from the files, the court holding that no evidence could be introduced to sustain them. Judgment was entered against the property, from which this appeal has been prosecuted.

The assessment was for paving certain streets in Ottawa, two of which (Washington and Paul) lie immediately adjacent to the appellant's property. The objections state that on December 19, 1910, the board of local improvements filed their certificate of completion and acceptance of the work in the office of the county clerk. On January 5, 1911, objections were filed to the approval of the certificate, charging, in substance, among other things, that the foundation course upon which the brick were laid was not constructed according to the ordinance; that the brick, gravel,

sand and cement and asphalt filler were not the kind prescribed in the ordinance; that the streets had not been excavated to within two inches of the sub-grade and then brought to the true grade with a roller, as provided in the ordinance, and especially was this true opposite the property of the appellant; that the interstices of the brick were not filled with asphalt filling; that on Washington street, in front of the appellant's property, a sewer had been constructed on the south side of the street a short time before the improvement, and the earth was neither tamped nor rolled where the sewer was filled, so that the pavement above the sewer settled down until it was several inches lower than the grade of the street; that the city engineer and contractor attempted to rectify the defect by taking up the brick and raising the grade by placing sand under the brick, but that the improvement, after being re-constructed, was still below grade and the surface water remained along the street in front of appellant's property; that at this place several bricks had come apart to the extent of one-half inch or more, some ends being depressed while others were elevated; that the brick used were not those prescribed in the ordinance, but were imperfect, cracked, broken and chipped, and are not laid in straight lines but in curved and crooked lines, and that, contrary to the ordinance, portions of brick were used smaller in size than a quarter of a brick.

The objections to judgment stated on January 28, 1911, a hearing was had upon the objections to the approval of the certificate of completion, and the court entered an order directing that certain curbing on Superior street should be re-faced and re-lined; that the brick in the gutter on Washington street, from the alley west of appellant's property east to the inlet at the intersection of Washington and Paul streets, be re-laid at the grade established; that the gutter on the east side of Paul street, to a point two hundred feet south of the intersection of Paul and Washington streets, be re-laid at the established grade; that the asphalt filler

on a part of Jackson street should be replaced, and that all crossing plates not in accordance with the ordinance should be re-set.

It was further stated that on February 15, 1911, the contractor filed a bond in the sum of \$2000, conditioned for the faithful performance of the uncompleted portions of its contract, which was approved by the court over the objection of appellant, and thereupon the court entered an order which, after reciting the previous order of January 28, provided as follows: "And it appearing to the court that the Illinois Cement Construction Company has entered into bond to faithfully do and perform the work required to be done in the further completion of its contract with the city of Ottawa, and that said bond is good and sufficient security for the performance of said work, it is therefore ordered that the certificate of completion is approved and confirmed," etc.

The objections further allege that the contractor, during April, 1911, made a pretense to complete the work adjoining the property of appellant, but that it did not remove the pavement on Washington street from the alley east to Paul street and re-pave the same, as ordered by the court, but it removed and re-set a portion of the pavement, only; that in tearing up the pavement it broke off large pieces of nearly all of the brick and then re-set the same brick instead of using new ones; that the brick, as re-set, in many places had a space of from one and one-half to two inches between them; that the water would not drain from said portions of the street any better than it would before the contractor was ordered to re-lay the pavement; that the asphalt poured between the brick was not composed of the material nor in the same proportions as provided in the ordinance; that none of the cast-iron crossing plates had been re-set, and that nearly all of them were warped and in some places were over an inch above the level of the adjoining surface; that the concrete curb constructed on the

south side of Washington street was composed of clay and other inferior materials; that at no time since the orders of January 28 and of February 15 had the board of local improvements inspected the work for the purpose of ascertaining whether the contractor had complied with the order of the court, and there had not been filed in the office of the county clerk any certificate of completion since the pretended completion of the work, nor had the county court approved the work as the same was supposed to have been completed; that the appellant had been unable to find a bond signed by the contractor under the order of February 15; that before appellant could be compelled to pay the first installment the work should have been completed in compliance with the order of the county court and inspected by the board of local improvements, and the certificate of completion issued by the board should have been approved by the court; that sections 42 and 84 of the Local Improvement act are unconstitutional, being in conflict with the fourteenth amendment of the Federal constitution and the second section of the bill of rights of the constitution of the State of Illinois.

Striking the objections from the files and refusing to hear evidence in support of them amounted to holding that the facts stated constituted no legal objection to the application for judgment. It is sought to sustain the ruling on the ground that where an improvement has been provided for by an ordinance and has been accepted by the city authorities, objections that it has not been completed in accordance with the terms of the ordinance, or that the work done or materials used were not of as good quality as required by the ordinance, cannot be raised upon an application for judgment and order of sale, as was held in *People v. Whidden*, 191 Ill. 374, and *People v. Bridgeman*, 218 id. 568. That, however, is not the question presented here. By the amendment of section 84 of the Local Improvement act in 1903 the power theretofore exercised by the board of

local improvements to determine whether a local improvement had been constructed in accordance with the improvement ordinance, and to bind the city and the property owners by its acceptance, was taken away and conferred upon the court wherein the assessment had been confirmed. (*Case v. City of Sullivan*, 222 Ill. 56.) That section requires a certificate of the cost of a local improvement to be filed by the board of local improvements, and that whenever the assessment is divided into installments, as was the case here, the board of local improvements shall also state in said certificate whether or not the said improvement conforms substantially to the requirements of the original ordinance for the construction of the improvement. A hearing must be had upon such certificate after notice given, and the finding of the court as to its truth is conclusive and not subject to review. We have held that a special assessment is not delinquent until after this certificate has been filed, and that an application for judgment of sale before such section has been complied with cannot be maintained. (*Gage v. People*, 219 Ill. 634.) It is essential that it should be so, for otherwise the property owner would have no opportunity to have the judgment of a court as to whether the improvement conformed to the ordinance, but might be compelled, without remedy, to pay for an improvement different from that authorized by the ordinance. We said in *Case v. City of Sullivan*, *supra*, on page 61: "We think the amendment to section 84 was passed mainly to prevent a local improvement not constructed substantially in accordance with the improvement ordinance being foisted upon property owners by the action of the board of local improvements, and was intended to afford the property owner, as well as the city, a speedy and summary hearing on that question before the tribunal wherein the assessment was confirmed, before the property owner should be required to pay his assessment or the city to issue improvement bonds in payment thereof."

Section 84 provides that if the court shall find against the allegations of the certificate the board of local improvements shall procure the completion of said improvement in substantial accordance with the ordinance, and may file additional or supplemental petitions in respect thereto until the court shall be eventually satisfied that the allegations of such certificate or petition are true and that said improvement is constructed in substantial accordance with the said ordinance. The court found against the allegations of the certificate and required certain changes to be made and additional work to be done. According to the averments of the objections no further application or petition was filed by the board of local improvements, no effort was made to complete the improvement in substantial accordance with the ordinance, and nothing further was done except that the contractor entered into a bond to faithfully do and perform the work required to be done in the further completion of its contract with the city of Ottawa, which bond the court found to be good and sufficient security for the performance of said work, and an order was thereupon entered that the certificate of completion be approved. No finding has ever been made that the improvement conforms substantially to the requirements of the original ordinance, and, of course, none could be made under the circumstances alleged. The bond was not authorized by the statute and the court was without authority to consider it. It was not an equitable proceeding. The duty of the court was plain, upon the proper certificate being filed, to find that the improvement did or did not conform to the requirements of the ordinance. The very object of the section was to provide, not for security, but for the actual performance of the work and the adjudication of the court that it had been performed in accordance with the ordinance before the property owner could be called on to pay. This was not done if the averments of the objections were true, and the

appellant should have been permitted to prove them if she could.

The judgment will be reversed and the cause remanded.

Reversed and remanded.

RAYMOND GILLETTE *et al.* Appellees, *vs.* ARTHUR W.
PLIMPTON *et al.* Appellants.

Opinion filed December 21, 1911—Rehearing denied Feb. 8, 1912.

1. REAL PROPERTY—*evidence must be convincing to establish an adverse equitable title.* In order to establish an adverse equitable title the evidence of such title must be clear and unequivocal and lead to but one conclusion.

2. SAME—*when legal titles will not be disturbed after lapse of time.* Legal titles will not be disturbed after a long lapse of time where the parties, with full knowledge of the facts, make no effort to have their rights declared; and this is especially true where the delay has been so great that the death of witnesses and loss of evidence render it practically impossible to make a defense.

3. DESCENT—*when provisions of section 11 of Statute of Descent do not apply.* Gifts to legatees or devisees who die before the death of the testator are not saved to the issue of the deceased legatee or devisee by the provisions of section 11 of the Statute of Descent unless such legatees or devisees are children or grandchildren of the testator.

4. PARTNERSHIP—*what is not sufficient to show a partnership.* The fact that two men who had formerly been business partners and were then living in the same house signed a memorandum saying, "We share our wealth, joy and burdens together. This means Jennie, too," (referring to a sister of one of the men, who resided with them,) is not sufficient to show a partnership between the men in the purchase of a tract of land, there being no other facts proven upon the question except that the men had owned another tract of land jointly and had sold the same, receiving a part of the purchase money three years and the balance more than one year before the other tract was bought.

5. WILLS—*party cannot take under will and in opposition to it.* Where a will bequeaths a legacy to one person and devises the homestead to another, the legatee cannot take the legacy under the will and at the same time recover the homestead, in a partition proceeding, in opposition to the will.

APPEAL from the Circuit Court of Grundy county; the Hon. SAMUEL C. STOUGH, Judge, presiding.

CHARLES C. SACHSE, O'DONNELL, DONOVAN & BRAY, JAMES S. DODGE, JR., and HARRY E. CARTHEW, (J. L. O'DONNELL, of counsel,) for appellants.

W. E. VINER, and J. W. RAUSCH, for appellees.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

On February 22, 1907, a bill was filed in this case in the circuit court of Grundy county by Raymond Gillette, a minor, by his next friend, and Jennie Gillette, heirs-at-law of George Gillette, deceased, against Hiram Plimpton and his conservator, J. C. Carr, and others, alleging that said George Gillette was the equitable owner of an undivided half of a section of land in Iroquois county and half a block in the city of Morris, in Grundy county, and the complainants prayed for partition and an accounting of rents and profits. Jennie Gillette died intestate on March 23, 1907, and Flora M. Gillette was appointed administratrix of her estate. Hiram Plimpton died testate on August 30, 1907, and J. C. Carr was his executor. A supplemental bill was filed alleging said facts and praying for the same relief against the devisees of Hiram Plimpton. By a subsequent amendment the complainants charged that said executor had collected money due Hiram Plimpton and George Gillette on a mortgage, and praying for an account of one-half to the administratrix of George Gillette. The answers denied any right or title in George Gillette and set up the Statute of Limitations and *laches*. The chancellor heard the evidence and granted the relief prayed for.

The claim of an equitable title to one-half of the real estate was based on an alleged partnership between Hiram

Plimpton and George Gillette, and the evidence to sustain the claim consisted of the testimony of witnesses concerning events and conversations running back to the year 1850. It seems essential to a satisfactory decision that the evidence should be stated, but, naturally enough, it is practically impossible to make any connected statement of facts proved, or their chronological order, because of the dim and uncertain recollection of witnesses, failing memories, and the fact that the witnesses sometimes varied as much as ten years concerning the dates of events they testified to. The facts, as nearly as they can be stated, are as follows:

About 1850 George Gillette and Jennie Gillette, his sister, and Hiram Plimpton and his wife, Eliza, who was a sister of George and Jennie Gillette, had come to Morris. Hiram Plimpton and George Gillette, as partners, kept a hotel from 1850 to 1854 or 1855, and ran an omnibus in connection with the hotel. When this business was closed they established a harness shop and were partners in that, but Plimpton left the shop at some time not fixed by the evidence. On July 4, 1856, a deed was made to Plimpton of a part of block 21 and a house was built on the premises soon afterward, which was occupied by all the parties as a home as long as they lived. Eliza Plimpton died on July 13, 1859, and after that the family consisted of the three remaining members. In 1860 a deed was made to correct some mistake in the deed of 1856. About 1869 Plimpton and T. T. Davis went into the pump business and sold pumps and eave-troughs around the country for a number of years; and about 1869 the harness business was closed up. Plimpton remained in the pump, lightning rod and eave-trough business with Davis for a term of years, and during part of that time he was also in business with one Jordan in buying and shipping poultry and eggs, and also bought furs, but the fur business seems to have been on his own account. The poultry, eggs and fur business continued until about 1878. Plimpton was also in the

grocery business with S. T. Hall for five or six years after he left the harness shop. There was also testimony that Plimpton was in the grocery business with a man named Eaton, but the time or period was not fixed. After Gillette left the harness shop he worked at different things, and there was testimony that he took care of the team used in the pump business, but it is certain that during the pump and grocery period he worked for Halburt at \$40 a month for five years from February, 1872, in a clothing store, and gave his whole time to that business. At other times, and probably after he worked in the clothing store, he worked in a jewelry store and a cigar store. In 1867 or 1868 Plimpton owned a tract of land in Grundy county of eighty-two and one-half acres which he attended to personally, and he bought, sold and owned a great many other pieces of property in and about Morris. He and George Gillette were the owners of a half section of land in Grundy county, which they sold on March 3, 1869. Part of the purchase price was paid then and the remainder was all paid more than a year before November 3, 1873. On the latter date Plimpton loaned \$6000 to William Peacock, secured by a mortgage on the section of land in Iroquois county. There is no evidence from what source the money came nor any evidence what became of the proceeds of the Grundy county land. The mortgage was made to Plimpton, and he afterward bought two junior mortgages on different parts of the section and caused sales to be made under powers in those mortgages. He bought the section at the sales and received deeds. Plimpton managed that property, rented it, visited it frequently, treated it in every respect as his own and always paid the taxes on it. The tenant who occupied it from the time it was bought up to the hearing did not know Gillette or suspect that he had or claimed any interest in the land. On May 27, 1893, Plimpton and Gillette jointly loaned to Ragan \$3000 secured by mortgage, and the notes were payable to Hiram

Plimpton and George Gillette. These are the notes collected by the executor of Plimpton. George Gillette died, as before stated, on November 21, 1894, and no administrator of his estate was appointed until twelve years afterward, in 1906, when Flora M. Gillette took out letters of administration. In 1900 Plimpton executed a will when Jennie Gillette was present, disposing of all the real estate and his other property, giving to her the net income of the entire estate, including the use of the homestead in Morris during her natural life, and devising the real estate to relatives. She objected strenuously at the time to having any of the property go to the Plimptons and insisted that he should give her the homestead, but he refused to do so. It does not appear that she made any claim that George Gillette had any title or that she had as his heir, but she did object to having any property go to Plimpton's relatives. The taxes on the homestead were sometimes paid in the name of Plimpton and sometimes in the name of Plimpton & Gillette. On October 13, 1906, Carr was appointed conservator of Plimpton. There was no evidence tending to prove the existence of any partnership after Plimpton left the harness shop, except the recollection of witnesses as to statements by him that he and Gillette were interested in all their business, or remarks of that character. Witnesses testified that Plimpton said Gillette had money in the Iroquois county land, and that he also said that Jennie put money in it too, which would have as much tendency to prove that Jennie Gillette was an equitable owner as that George Gillette was. There was a memorandum in a diary under date of January 1, 1871, signed by Gillette and Plimpton, saying: "We share our wealth, joy and burdens together. This means Jennie, too," under which were the figures "3-4-83." But clearly that was insufficient to show a partnership between Plimpton and George Gillette. The money from the sale of the half section of land in Grundy county belonged to Plimpton and

Gillette jointly, but there is nothing from which an inference can be raised as to what became of it more than three years after part of it was paid and more than a year after the final payment.

There was no controversy concerning the existence of the partnership in the hotel business and the harness shop at the time the homestead was bought. The parties had no means when they engaged in the hotel business nor any known source of income except from their partnership undertakings. It is, perhaps, a fair inference from the evidence that the property in Morris was purchased and the house built with partnership money. The taxes were sometimes paid in the name of one and sometimes in the name of both, and the homestead was occupied by both with apparently equal rights. George Gillette remained there until he died and Jennie Gillette afterward, and so long as their right was not disputed there was no reason to make any claim to a conveyance of the legal title, at least until the will was made. We are not prepared to say that the chancellor erred in the decree respecting that property.

The notes collected by Carr, as executor, were payable to Hiram Plimpton and George Gillette, and that was not a matter which it was necessary to submit to the county court. The share of George Gillette was not collected as assets of the estate of Plimpton but was money belonging to the administratrix of Gillette. Carr, when he collected it, was bound to account to the administratrix for one-half, which she would have been entitled to recover from him personally, in an action at law. But as the court had equitable jurisdiction on other grounds it was not improper to settle the whole matter in the same suit.

In order to establish an adverse equitable title it is essential that the evidence of such title should be clear and unequivocal and lead to but one conclusion. It is also a settled rule with courts of equity that legal titles will not be disturbed after a long lapse of time, where parties, with

full knowledge of the facts, make no effort to have their rights declared. There is added force to the rule where the delay has been so long that the death of witnesses and loss of evidence render it practically impossible to make a defense. (*Wilcoxon v. Wilcoxon*, 230 Ill. 93; *Hamilton v. Hamilton*, 231 id. 128; *Weber v. Chicago and Western Indiana Railroad Co.* 246 id. 464.) In this case the complainants delayed until everyone who could have testified to the actual relations of the parties and the controlling facts was dead. When the original bill was filed Plimpton had lost his mind and had a conservator, and Gillette had long been dead. Plimpton had carried on business in poultry and eggs with Jordan, and Jordan was dead. He was in business with Eaton and Hall and Davis, and they were all dead. The necessity of the rule administered by courts of equity is made manifest by the facts of this case. The evidence was of such uncertain nature and based upon such doubtful and uncertain recollection of witnesses, and consisted to such an extent of nothing but alleged remarks of Plimpton, (which is a most uncertain sort of evidence,) that the rule requiring the evidence to be clear and unequivocal was not satisfied. Flora M. Gillette, who had become the wife of one Reichert, gave much testimony of the same general nature as that of the other witnesses, but she was a party to the suit and not competent to testify against the devisees of Plimpton. We cannot agree with the chancellor as to that part of the decree relating to the Iroquois land.

Deborah Wheelock and Mary Cottrel, devisees under the will of Hiram Plimpton, were alleged in the supplemental bill to have died before his death and their unknown heirs were made defendants. The decree established title in said heirs to the shares which the devisees would have taken if living. Their devises were not saved to their issue, if they left any, by section 11 of the Statute of Descent, as they were not children or grandchildren of the

testator, and the decree was wrong in that respect. The will gave the complainant Raymond Gillette \$1000 and devised the homestead to another. He cannot take the bequest under the will and take the homestead in opposition to it.

The decree is affirmed so far as it establishes an equitable title in the homestead property in Morris and requires the executor to account for one-half of the money collected by J. C. Carr on the Ragan mortgage and is reversed in all other respects. The cause is remanded to the circuit court for further proceedings in accordance with the views expressed in this opinion. The costs of the appeal will be divided equally between the appellants and appellees.

Decree affirmed in part.

HATTIE SCHLAUDER, Defendant in Error, *vs.* THE CHICAGO AND SOUTHERN TRACTION COMPANY, Plaintiff in Error.

Opinion filed December 21, 1911—Rehearing denied Feb. 8, 1912.

1. RAILROADS—*railroad organized under general Railroad act is a commercial railroad though motive power is electricity.* A corporation organized under the general act for the incorporation of railroads is a commercial railroad although it uses electricity as a motive power, and it has the rights and is subject to the burdens of railroads so organized, and the act concerning the fencing and operation of railroads applies to it.

2. NEGLIGENCE—*party cannot regulate his conduct solely upon presumption that others will perform duties imposed upon them.* The presumption that every person will perform a duty enjoined by law or imposed by contract is to have due weight in determining questions of negligence, but the presumption is not conclusive, and no person has a right to rely solely upon it in regulating his conduct.

3. SAME—*one railroad company cannot rely solely upon presumption that another's train will stop before reaching crossing.* A railroad company engaged in carrying passengers cannot rely

solely upon the presumption that another company will perform its legal duty to stop its train before reaching the crossing of the two railroads, and failure of the former company to exercise due care is not excused by such presumption, even though the accident would not have happened had the other one obeyed the law.

4. SAME—*witness cannot give opinion as to very fact the jury is to determine.* In a personal injury suit, where the defendant disputes the fact that the plaintiff was injured and the evidence in its behalf tends to prove that she was not injured, it is error to permit a physician to testify that in his opinion the plaintiff was "permanently injured as a result of that accident." (*Chicago v. Didier*, 227 Ill. 571, *Chicago Traction Co. v. Roberts*, 229 id. 481, and *Fuhry v. Chicago City Railway Co.* 239 id. 548, explained.)

5. SAME—*when recovery cannot be based upon the defendant's failure to stop its car before crossing railroad.* Failure of the defendant to stop its electric car before starting to cross the track of another commercial railroad cannot be made the basis of a recovery for alleged injuries sustained when the car was struck by a train of the other railroad, where the car had been standing upon the tracks of the other railroad from three to five minutes before the train appeared; but the right of recovery, if any, depends upon whether the defendant was negligent in allowing the car to remain on the tracks without taking steps to protect it.

6. INSTRUCTIONS—*statement of an hypothesis of fact virtually tells the jury such fact exists.* An instruction stating that if a certain fact exists a certain rule of law applies or a certain verdict must be returned, virtually tells the jury that there is evidence from which they may believe in the existence of the fact, and if there is no evidence of the fact the instruction is erroneous.

7. SAME—*effect where court refers jury to declaration instead of stating hypothesis of fact.* If the court, instead of stating an hypothesis of fact and basing thereon a rule of law or direction to the jury, refers the jury to the declaration or the several counts, the instruction is equivalent to one embodying the facts stated in the declaration as an hypothesis of fact; but where this method is employed it is not improper to give the instruction although there is no evidence to sustain some of the counts.

8. SAME—*when giving an instruction authorizing verdict upon proof of negligence charged in any count is error.* An instruction stating that if the defendant was guilty of negligence as charged in some one count and the plaintiff was injured by reason of such negligence while she was in the exercise of ordinary care she is entitled to recover is erroneous, where there is one count which

alleges a fact and charges it to be negligence and which is proven but which does not entitle the plaintiff to recover.

9. SAME—*instructions referring jury to declaration are not approved.* The practice of giving instructions referring the jury to the declaration is not approved.

WRIT OF ERROR to the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Will county; the Hon. CHARLES B. CAMPBELL, Judge, presiding.

LOWES & RICHARDS, (MAYER, MEYER, AUSTRIAN & PLATT, and FREDERICK D. JORDAN, of counsel,) for plaintiff in error.

J. L. O'DONNELL, T. F. DONOVAN, and J. A. BRAY, for defendant in error.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The Appellate Court for the Second District affirmed the judgment for \$6000 and costs recovered by defendant in error against plaintiff in error in the circuit court of Will county, and a writ of *certiorari* was granted by this court for the purpose of reviewing the judgment of the Appellate Court.

The suit was an action on the case for personal injuries received by plaintiff while a passenger on the car of defendant. The plea was not guilty, and the defendant asked the court to direct a verdict of not guilty, which the court refused to do. The evidence from which the correctness of that ruling must be determined was as follows:

The defendant is a railroad company organized under the general act for the incorporation of railroad companies and operates a railroad from Chicago to Kankakee. The power used is electricity, applied by means of an overhead trolley wire and pole. On August 30, 1909, the plaintiff,

with her husband, took passage from Chicago to go to Peotone. After passing Blue Island the car approached a crossing of the Grand Trunk railroad on the same level. The trolley pole became disconnected from the wire and the car stopped on the crossing and stood there from three to five minutes, as testified to by several of the plaintiff's witnesses, and there was no contradictory evidence on that question. There were about thirty passengers, who remained seated in the car until a train on the Grand Trunk railroad was seen coming around a curve from the west at a distance of from six hundred to eight hundred feet from the car. The defendant's conductor ran out on the track and signaled to the approaching train and the engineer made every effort to stop it. An alarm being given, the passengers made a general rush for the door to get out. A number of them were crowded at the door to the vestibule when the other train reached the car. The train was almost stopped and moving not faster than a slow walk, but it pushed the end of the car around and stopped beyond the car somewhere from fourteen feet up to the length of the engine, or perhaps forty or fifty feet. As a result of the collision the plaintiff was thrown forward into the vestibule, which was considerably lower than the floor of the car, and several other women fell on her. There was a bruise on her hip three or four inches in diameter, where considerable swelling followed, and this was the only external sign of injury. She was treated for some time by a physician and suffered from other disabilities which the evidence in her behalf tended to prove had not existed before the accident.

There were five counts in the declaration. The negligence charged in the original declaration was that the defendant carelessly, recklessly, negligently and improperly propelled and ran the car and permitted and allowed it to stand on the railroad track on which the train was approaching. The first of four additional counts afterward

filed charged as negligence that the defendant did not use due, proper or reasonable care that the plaintiff should be safely carried on the car. The second alleged that the defendant did not use due care and caution that the plaintiff should be safely carried, but so recklessly and improperly drove and managed the car that it collided with the locomotive and train propelled by steam on the other road. The negligence charged in the third was, that the defendant failed to bring its car to a stop at a reasonably safe distance from the steam railroad, and failed to use any reasonable precaution to ascertain whether or not any train or locomotive was approaching thereon, and carelessly and negligently ran and propelled its car over and upon said steam railroad tracks. The fourth charged that the defendant so carelessly and negligently managed, conducted and propelled its car that the car was struck and came in collision with the passenger train.

It is not claimed that there was any want of care on the part of the plaintiff, but it is insisted that the defendant was entitled to the benefit of the presumption of law that the other railroad would obey the statute and comply with the law which required it to stop within eight hundred feet of the crossing of another railroad on the same level and to positively ascertain that the way was clear and that the train could safely resume its course before proceeding to pass over the crossing. Basing their argument on that presumption, counsel contend that the defendant was not guilty of any negligence in failing to anticipate a disregard of the statute by those in charge of the train. The defendant being organized under the general act for the incorporation of railroads, its railroad is a commercial railroad, and we so decided in *Bradley Manf. Co. v. Chicago and Southern Traction Co.* 229 Ill. 170. It has the rights and is subject to the burdens imposed by law upon railroads so organized, and the statute concerning fencing and operating railroads applies to it. (*Butler v. Aurora, Elgin and*

Chicago Railroad Co. 250 Ill. 47.) The train on the Grand Trunk railroad was not stopped as required by the statute, and if it had been the accident would not have happened, but if defendant was negligent the fact that the other railroad company was also negligent was no defense. (*Chicago and Eastern Illinois Railroad Co. v. Mochell*, 193 Ill. 208.) There is a presumption of law that every person will perform the duty enjoined by law or imposed by contract, and anticipation of negligence in others is not a duty which the law imposes. (*Chicago, Burlington and Quincy Railroad Co. v. Gunderson*, 174 Ill. 495; *Chicago City Railway Co. v. Fennimore*, 199 id. 9.) While that statement has often been made and the presumption is to have due weight in determining questions of negligence, it is manifest that the presumption is not a conclusive one and that no one has a right to rely solely upon it in regulating his own conduct. The presumption does not absolve one from exercising such care and prudence as a reasonably prudent person would under the same circumstances, nor relieve a carrier of passengers from the duty of exercising that degree of care demanded by the law in view of the circumstances and surroundings. One who has an unobstructed view of an approaching train would not be justified in closing his eyes and crossing a railroad track in reliance upon the presumption that a bell would be rung or a whistle sounded. No one can assume that there will not be violations of the law or negligence of others and offer the presumption as an excuse of failure to exercise care. Although the presumption is to be considered, it is not conclusive that the defendant was not guilty of negligence. Counsel who seek to sustain the ruling say that there was evidence that the car jiggled and jerked in coming up an incline under the tracks of another railroad, which tended to show that the equipment of the car was out of order, but there was no charge of that kind in the declaration. It is also contended that there was negligence in not stop-

ping the car before reaching the railroad, but if it was not stopped the fact had nothing to do with the accident. There were, however, very general charges of negligent management of the car,—so general, in fact, as to admit of almost any evidence respecting what was done in its management,—and also general charges of the want of proper care to safely carry the plaintiff. Under these charges the question whether it was negligence to have the car standing from three to five minutes on the track of the steam railroad without any precaution to ascertain whether a train was approaching or to give notice to such a train that the track was blocked was properly submitted to the jury, and the court did not err in refusing to direct a verdict.

On the examination of the physician who attended the plaintiff he testified to the existence of the bruise on the right thigh which existed for a few weeks, and said that the plaintiff had soreness over the lower part of the abdomen and other physical troubles peculiar to women; that she became depressed, morbid, melancholy and hysterical, and that she had a sense of suffocation, and suffered from a loss of memory, morbidness, brooding, worry, and fear that some calamity would happen. He had received an account of the accident from her and her husband, and he was asked this question: "Have you an opinion whether or not Mrs. Schlauder is or is not permanently injured as a result of that accident?" The question was objected to on the ground that it placed the doctor in the position of the court and jury to determine one of the issues in the case, but the objection was overruled. He answered that he had an opinion and that he thought she was permanently injured. The rule is, that a witness cannot be permitted to give his opinion on the very fact which the jury is to determine. (*Illinois Central Railroad Co. v. Smith*, 208 Ill. 608.) In *City of Chicago v. Didier*, 227 Ill. 571, it was explained that where there is a conflict in the evidence as to whether the plaintiff was injured in the manner claimed,

it is not competent for witnesses to give their opinions on that subject, but in that case there was no dispute as to the manner and cause of the injury nor any dispute that the injury to the plaintiff's knee was caused by the fall. Inasmuch as there was no controversy on those questions, it was not considered improper to ask the doctor what he would say was the cause of the condition in which he found the knee. There were the same admissions in *Chicago Union Traction Co. v. Roberts*, 229 Ill. 481, and *Fuhry v. Chicago City Railway Co.* 239 id. 548. That was not the case here. The evidence was admitted while the plaintiff was making out her case to establish the cause of action alleged, and the plea was not guilty. The record shows no admission of an injury to the plaintiff, but while it was not denied that the plaintiff fell, the fact that she was injured was disputed, and the evidence for the defendant tended to prove that she was not injured. Two physicians testifying for the defendant, in answer to hypothetical questions embracing conditions and symptoms testified to by the plaintiff's doctor, gave it as their opinion that they had no relation to or connection with the accident. Under the rule stated in the *Didier case* the ruling was wrong.

The second instruction given at the request of the plaintiff stated that if she had proved the allegations in one or more counts of her declaration and was injured as therein alleged, and the injury was caused by or through the negligence of the defendant as alleged in such count, she was entitled to recover. The third told the jury that if they believed the plaintiff was injured, as alleged in some one count of the declaration, by reason of the failure of the defendant's servants, as alleged in the declaration or some count thereof, to exercise the degree of care stated in the instruction, while she was in the exercise of ordinary care and caution, she was entitled to recover and they should find the defendant guilty. The fourth stated that if the defendant was guilty of negligence as charged in some one

count of the plaintiff's declaration, and by reason of such negligence the plaintiff was injured while in the exercise of ordinary care, they should find the defendant guilty. It is contended that there was no evidence tending to sustain the allegations of the second or third additional counts, and therefore the instructions were erroneous. It has always been the rule that it is error to give an instruction telling the jury that if a certain fact exists a certain rule of law applies or a certain verdict is to be returned, if there is no evidence of the fact. Such instructions must be based upon evidence in the case, and a statement of a hypothesis of fact virtually tells the jury that there is evidence from which they may believe in the existence of the fact, and if there is no evidence the instruction is misleading. (*Alexander v. Town of Mt. Sterling*, 71 Ill. 366; *Indianapolis and St. Louis Railroad Co. v. Müller*, id. 463; *Nieman v. Schnitker*, 181 id. 400; *Spring Valley Coal Co. v. Robizas*, 207 id. 226.) If the court, instead of stating an hypothesis of fact and basing thereon a rule of law or direction to the jury, refers the jury to the declaration or to the several counts, the instruction is equivalent to one embodying facts stated in the declaration as such a hypothesis. The jury must go to the declaration or the several counts to learn the facts which the court says they are to believe from the evidence, but if that method is employed it is held not improper to give the instruction although there is no evidence to sustain some of the counts. That rule was stated in the recent case of *Chicago City Railway Co. v. Foster*, 226 Ill. 288, where several cases holding the same doctrine were reviewed. The argument, therefore, that these instructions were erroneous because there was no evidence tending to support some of the counts referred to in them cannot be sustained.

There was at least one count, however, which alleged a fact and charged it to be negligence which was proved by the evidence but did not entitle the plaintiff to recover or

authorize a verdict of guilty. The charge in the third additional count was, that the defendant failed to bring its car to a stop at a reasonable distance from the steam railroad and then and there failed to use any reasonable precaution to ascertain whether or not any train or locomotive was then and there approaching on said steam railroad and carelessly and negligently ran and propelled its car over and onto said railroad tracks. Witnesses testified that the car did not stop before reaching the tracks of the Grand Trunk railroad, but there was an utter failure to connect the act with the injury to the plaintiff. According to the uncontradicted testimony of the plaintiff's witnesses the car stood on the tracks from three to five minutes, and it would have availed nothing if it had been stopped and the conductor had looked for the train, which was from a mile and a half to two miles distant. If he had looked he would have seen nothing, but the failure to stop the car and look was alleged as a fact and charged as negligence, and there was evidence to prove the fact. The first point made by counsel in support of the refusal to direct a verdict is that the evidence conclusively established the negligence of the defendant in not bringing its car to a stop before it reached the railroad tracks, and the testimony of witnesses is recited at length to show that the fact was proved. If learned counsel take that view of the liability of the defendant for the accident, it certainly cannot be said that the instructions were not calculated to mislead the jury and induce them to adopt the same theory. Furthermore, the practice of giving instructions referring the jury to the declaration has been repeatedly disapproved. The evidence as to whether there was any substantial injury to the plaintiff, and the extent of such injury, if there was any, was conflicting, and the errors pointed out were prejudicial to the defendant.

The judgments of the Appellate and circuit courts are reversed and the cause remanded to the circuit court.

Reversed and remanded.

THE BOARD OF HIGHWAY COMMISSIONERS, Appellee, vs.
THE CITY OF BLOOMINGTON, Appellant.

Opinion filed December 21, 1911—Rehearing denied Feb. 9, 1912.

1. PARTIES—*suit to recover from city road-tax money due the township may be brought by the board of highway commissioners.* An action to recover from a city money raised by road and bridge taxes and belonging to a township is not improperly brought in the name of the board of highway commissioners, as the township is the beneficial plaintiff, and the recovery and satisfaction of a judgment will bar any other action on the same cause of action in the name of the town or any agent thereof.

2. SAME—*when objection to right of nominal plaintiff to sue is waived.* An objection that a suit to recover from a city money belonging to a township should have been brought in the name of the town or in the name of the township treasurer, instead of in the name of the board of highway commissioners of the township, is waived and cannot be insisted upon on appeal where it was not raised in the trial court.

3. CONSTITUTIONAL LAW—*when principle of uniformity of taxation is not violated.* The principle of uniformity of taxation is not violated by the levying of taxes for similar purposes by overlapping municipalities.

4. SAME—*sections 13 and 14 of Roads and Bridges act are not invalid.* Sections 13 and 14 of the Roads and Bridges act, concerning the levy of taxes for road and bridge purposes, do not violate the constitutional principle of uniformity of taxation because no exception is made exempting from such taxes property in the township which is within the limits of a city or village and which is taxed to maintain streets and bridges therein.

5. SAME—*an unconstitutional statute confers no rights and affords no protection.* An unconstitutional statute confers no rights, imposes no duties and affords no protection, and in legal contemplation the situation is the same as though such statute had never been passed.

6. ASSUMPSIT—*when assumpsit may be maintained although there is no privity of contract.* The action of assumpsit, under the common counts for money had and received, is an appropriate remedy to enforce the equitable obligation arising from the receipt of money by one person which belongs to another and which in equity and justice should be returned; and although the action is in form *ex contractu*, the alleged contract is purely fictitious and the right of recovery is governed by principles of equity, and

no privity of contract is necessary. (*Trumbull v. Campbell*, 3 Gilm. 502, *Hall v. Carpen*, 27 Ill. 386, and *Carpen v. Hall*, 29 id. 512, distinguished.)

7. SAME—*when assumpsit will lie to recover from city money due township.* Where a city has received from the collector of taxes money which it uses for its own purposes but which belongs to the township, an action of assumpsit for money had and received will lie against the city to recover such money, even though at the time the money was paid over to the city there was a law authorizing such payment, which was assumed to be valid but which was subsequently declared invalid.

8. SAME—*when city cannot raise question of legality of taxes.* In an action of assumpsit against a city to recover money raised by taxation for road and bridge purposes and paid over by the collector to the city under the authority of a statute which was subsequently declared invalid, the city cannot raise the question that the certificate of levy was defective and the taxes illegally levied.

9. INTEREST—*when interest is not recoverable.* Where money arising from road and bridge taxes is received and expended by a city in good faith, under the authority of a supposedly valid law, the mere fact that the township to which the money belongs brings suit to recover it after such law is declared invalid does not entitle the township to recover interest on the amount due.

APPEAL from the Circuit Court of McLean county; the Hon. COLOSTIN D. MYERS, Judge, presiding.

A. W. PEASLEY, City Attorney, FITZHENRY & MARTIN, and BARRY & MORRISSEY, for appellant.

STONE, OGLEVEE & FRANKLIN, for appellee.

Mr. JUSTICE VICKERS delivered the opinion of the court:

The Board of Highway Commissioners of the town of Bloomington, in McLean county, brought an action of assumpsit, based on the common counts, against the city of Bloomington to recover from the said city the amount of taxes collected on property in Bloomington township located within the corporate limits of the city of Bloomington and paid over by the collectors of revenue to the city

of Bloomington under the third proviso of section 16 of the Road and Bridge law, as amended in 1909. The taxes in question were levied under sections 13 and 14 of the Road and Bridge law in 1909 and were collected and paid over to the city in 1910. The Board of Highway Commissioners of Bloomington township levied the limit of thirty-six cents for road and bridge purposes under section 13 of the Road and Bridge law and made a certificate that a contingency existed in said township requiring a greater levy than thirty-six cents, and obtained the consent of the board of town auditors and the assessor for an additional levy of twenty-five cents under section 14 of the Road and Bridge law, as amended in 1909, which said levies were spread upon the property of the township and collected with other taxes by the collectors. By the third proviso of section 16 of the Road and Bridge law, as amended in 1909, it is enacted "that in all cities of twenty thousand inhabitants or upwards, all of said tax required to be levied and collected under said sections 13 and 14, within the limits of such city, shall be paid over to the treasurer of such city for city purposes." The city of Bloomington having a population of more than twenty thousand inhabitants, under said proviso the taxes in question were paid over to the treasurer of said city. The money was received by the city in two installments, \$24,670.81 being paid over May 5, 1910, and the sum of \$16,316.67 being paid on August 15, 1910. The city appropriated the said funds by ordinance and used the same for the repair and maintenance of its streets. At the December term, 1910, of this court, in the case of *People v. Fox*, 247 Ill. 402, this court held that the third proviso of said section 16 of the Road and Bridge law was unconstitutional and void, in that it granted a special privilege to certain cities based upon a mere arbitrary classification. Upon the assumption that the decision of this court in the *Fox case* established the right of the board of highway commissioners to the money paid over to the city under the

unconstitutional proviso of section 16, said highway commissioners brought this action of assumpsit and recovered a judgment for the amount so paid over and \$1384.93 interest. From this judgment the city of Bloomington has prosecuted the present appeal.

The appellant contends that this suit was improperly brought in the name of the commissioners of highways; that the suit should have been brought either in the name of the town, under paragraph 46 of chapter 139 of Hurd's Statutes of 1909, or in the name of the township treasurer, for the reason that the money, being public funds belonging to the township, would be payable to such treasurer. There is no force in this objection. The township is the beneficial plaintiff and real claimant of the money sued for. A recovery of a judgment and a satisfaction thereof in the present action would be a bar to any future action, either in the name of the town or any other agent thereof, for this cause of action. Aside from this, we do not find that this question was raised in any way in the lower court. Appellant has therefore waived the right to raise it here.

Appellant next contends that sections 13 and 14 of the Road and Bridge law are unconstitutional as applied to a situation such as exists here, for the reason that there is no provision in said sections exempting property in that portion of the township which is embraced within the limits of the city of Bloomington. In support of this contention appellant's argument is that, the city of Bloomington being required to levy and collect taxes to maintain the streets and bridges within the city, the property of its citizens within that portion of the city embraced within the township of Bloomington cannot again be taxed by the township for the purpose of maintaining the roads and bridges of the township, and that to do so violates section 1 of article 9 of the constitution, in that it subjects the property in one part of the city to double taxation for one and the same purpose, and that said sections of the statute violate

the principles of uniformity in its application to townships having a city or village partly or wholly in such townships. The question thus raised has not been heretofore decided by this court in respect to the particular statutes here involved, but questions involving the principle which must here control have frequently been before this court. Cooley, in his work on Taxation, (p. 238,) says: "Taxing districts may be as numerous as the purposes for which taxes are levied. The district for a single highway may not be the same as that for a school house located upon it. It is not essential that the political districts of the State shall be the same as the taxing districts, but special districts may be established for especial purposes, wholly ignoring the political divisions. A school district may be created of territory taken from two or more townships or counties, and the benefits of a highway, a levee or a drain may be so peculiar that justice will require the cost to be levied either upon part of a township or county or upon parts of several such subdivisions of the State."

The principle of uniformity is not violated by levying taxes by two overlapping municipalities on the same property, even though it be for a similar purpose. (*Baird v. People*, 83 Ill. 387.) In the case above cited, the city of Morrison brought an action to recover that portion of the taxes levied by commissioners of highways for road and bridge purposes on the property in that portion of the township which was embraced within the corporate limits of the city under section 120 of chapter 121 of the Revised Statutes of 1874, which provided that such taxes should be paid to the city. In thus discussing that question, this court, speaking by Mr. Justice Scholfield, on page 389, said: "It is said, why should the city expect any part of the tax with which to pay damages by reason of the opening, altering or laying out new roads? To our minds the answer is obvious. The city is burdened with the entire expense of laying out, improving, repairing, etc., all ave-

nues of travel within its limits, whether they be called streets, boulevards, avenues, alleys or roads or highways, and of constructing and repairing bridges, culverts, etc.; and it was deemed by the legislature to be unjust to burden it also with the expense incident to the public highway system beyond its limits. But the township system frequently necessarily includes cities within the towns, which are created as subdivisions of the counties and for which commissioners of highways are elected. In levying taxes the commissioners of highways observe the constitutional mandate of 'uniformity within the jurisdiction of the body imposing the same,' and thus extend the tax alike within as beyond the city limits, throughout the town; but when collected, that arising from property within the city is to be used within the city, and that from property beyond its limits is to be used beyond its limits."

The same principle was involved in the case of *Wilson v. Board of Trustees*, 133 Ill. 443. In that case the validity of the act authorizing the organization of sanitary districts embracing the territory of cities and other municipalities was involved. The validity of the act was challenged on the ground that to authorize the organization of such districts with power to become indebted to the constitutional limit, and embracing other municipalities which also had a like power of contracting indebtedness, would, in effect, destroy the constitutional limitation as to municipal indebtedness. The validity of the act was sustained, and this court held that the constitutional limitation upon the extent of corporate indebtedness applies to each municipal corporation singly, and that where one municipal corporation embraces, in part, the same territory as others, each may contract corporate indebtedness up to the constitutional limitation, without reference to the indebtedness of any other corporation embraced wholly or in part within its territory. The township and the city are wholly distinct municipal corporations and are organized for different pur-

poses, and each may exercise the taxing power for legitimate corporate purposes within its own territorial limits, without reference to the exercise of like powers by other municipalities organized for different purposes whose territory is partly within such township.

The court did not err in refusing to hold appellant's proposition of law reciting that sections 13 and 14 of the Road and Bridge law were unconstitutional.

Appellant next contends that there can be no recovery in this action because there is no privity between the parties to the suit and no basis in the evidence for the finding that the money in question was received by appellant for the use of appellee. There is no dispute about the facts. In point of fact, at the time the money in question was collected and paid over it was doubtless supposed by all parties that it properly and legally belonged to the appellant. There was nothing in the nature of a contract relation in fact between the appellant and the appellee in respect to these funds. If appellee can sustain the recovery it must be upon some theory other than that there was a privity in fact, resulting from a contractual relation. The facts here present the question fairly whether an action in assumpsit can be maintained under a count for money had and received to the use of the plaintiff in the absence of any contractual relation whatever between the parties, and where the only evidence in support of such action is proof of the fact that money has been paid to defendant which legally belonged to and ought to have been paid to the plaintiff. Appellant answers this proposition in the negative, for the reason that there is no privity of contract between the parties. To this the appellee replies that no privity is required, other than that implied by the law, where one person has money in his hands, however received, which *ex aequo et bono* he ought to restore to the owner.

There is some confusion in the books in regard to the scope of the remedy in assumpsit for money had and re-

ceived. Some courts have fallen into error by supposing that this action can only be maintained where there is an express contract, or a contract implied in fact from the situation or conduct of the parties. By the common law the word "contract" included all rights which could be enforced by any of the actions *ex contractu*. By the common law classification every contract was either express or implied. Under these two heads were classified every form of obligation which was by the common law enforceable by an action *ex contractu*. Taking from the general mass all of the rights growing out of express contracts which were enforceable by actions *ex contractu*, we have left a miscellaneous group of rights which are enforceable by actions *ex contractu*, which are usually treated under the classification of implied contracts. At the present time that great body of rules of the common law which defines the rights, duties and obligations of the citizen, known as substantive law, is regarded as the principal and most essential part of the law, while in theory, at least, the adjective law of pleading, practice, evidence, remedies and procedure is secondary, and is designed merely to secure and enforce in an orderly manner the substantive law. In the earlier stages of the common law the procedure was the principal and the substantive law was in reality a mere appendix or supplement. The tenacity with which the ancient common law courts clung to the form of action and remedy has given rise to the creation of numerous fictions in the substantive law in order to fit an inexorable remedy to a new situation. The action of assumpsit was devised for the purpose of recovering damages for the non-performance of a parol or simple contract. (3 Johns. Cases, 60.) The word is derived from the Latin *assumere*, meaning to assume or to undertake. (Bouvier's Law Dict.) In the law of contracts the word was understood as an undertaking, either express or implied, to perform a parol agreement. An "express assumpsit," by the common law, was "an undertak-

ing made orally, by writing not under seal or by matter of record, to perform an act or to pay a sum of money to another." An "implied assumpsit" was defined to be "an undertaking presumed, in law, to have been made by a party from his conduct, although he has not made any express promise." (Bouvier's Law Dict.) There were two general forms in the action of assumpsit. "Special assumpsit" was brought upon an express contract or promise, while "general assumpsit" was brought upon an implied contract. (2 Smith's Leading Cases, 14.)

It will thus be seen that there is a general agreement between a special assumpsit and an express contract, and general assumpsit and an implied contract. As ordinarily understood, the only difference between an express contract and an implied contract is, that in the former the parties arrive at their agreement by words, either oral or written, sealed or unsealed, while in the latter their agreement is arrived at by a consideration of their acts and conduct. (2 Page on Contracts, sec. 771.) In both of these cases there is, in fact, a contract existing between the parties, the only difference being in the character of evidence necessary to establish it. A familiar illustration of an implied contract is, where one person, in the absence of any express agreement, renders valuable services to another which are knowingly accepted by such other, the law will imply a promise to pay a fair and reasonable compensation for such services. (*McFarlane v. Dawson*, 125 Ala. 428.) If an attorney renders services without any express agreement as to the amount of compensation to be received, the law implies a promise to pay him reasonable compensation for the work done. (*Miller v. Tracey*, 86 Wis. 330.) These illustrations are examples of genuine implied contracts, in all of which there is some act or line of conduct as a basis for the implication and which furnishes the necessary privity to support the action of general assumpsit. This class

of implied contracts is sometimes called contracts implied as of fact. (Page on Contracts, *supra*.)

After subtracting express contracts and contracts implied in fact, there is still left another large class of obligations, to enforce which the action of general assumpsit is a well established remedy. The principle upon which this latter class of obligations rests is equitable in its nature, and was, like most other equitable principles, derived from the civil law. This obligation was under the civil law designated "*quasi-contractus*." Stated as a civil law principle, it was "an obligation similar in character to that of a contract, but which arises not from an agreement of parties but from some relation between them or from a voluntary act of one of them, or, stated in other language, an obligation springing from voluntary and lawful acts of parties in the absence of any agreement." (Howe's Studies of Civil Law, 171; Morey on Roman Law, 371.) In *quasi* contracts the obligation arises not from consent, as in the case of contracts, but from the law or natural equity. "The term was not found in the common law but it has been taken by writers upon the common law from the Roman law and may be considered now as quite domesticated, even to the extent of being used as the title of a very valuable common law text book,—Keener on Quasi Contracts." (Bouvier's Law Dict.) Page, in his late work on Contracts, (vol. 2, p. 1166,) in discussing the term "*quasi* contract" says: "The term '*quasi* contract,' while but little used in law, is a term of considerable antiquity in English law. The term '*quasi ex contractu*' is used in Bracton to include 'agency, wardship, the division of common property, the distribution of an inheritance, an action arising out of a testament, a suit to require a sum paid not due, and such like.'"

The class of obligations now under consideration, and which are treated in works on contracts as "contracts implied in law," or *quasi* contracts, are recognized and en-

forced by common law courts by means of a general assumpsit. The liability exists from an implication of law that arises from the facts and circumstances independent of agreement or presumed intention. (*Pract v. Daniels*, 20 Colo. 100.) In this class of cases the notion of a contract is purely fictitious. There are none of the elements of a contract that are necessarily present. The intention of the parties in such case is entirely disregarded, while in cases of express and implied contracts in fact the intention is of the essence of the transaction. In the case of contracts the parties fix their terms and set the bounds upon their liability. As has been well said, in the case of contracts the agreement defines the duty, while in the latter class of cases "the duty defines the contract." (*Hertzog v. Hertzog*, 29 Pa. St. 468; *Columbus, Hocking Valley and Toledo Railway Co. v. Gaffney*, 65 Ohio St. 104; 61 N. E. Rep. 152.) The action of assumpsit, under the common counts for money had and received, is an appropriate remedy to enforce the equitable obligation arising from the receipt of money by one person which belongs to another and which in equity and justice should be returned. (*Gaines v. Miller*, 111 U. S. 395; *Pauly v. Pauly*, 107 Cal. 8; *Brown v. Woodward*, 75 Conn. 254; *Wilson v. Turner*, 164 Ill. 398.) The action is in form *ex contractu*, but the alleged contract being purely fictitious, the right to recover does not depend upon any principles of privity of contract between the plaintiff and the defendant and no privity is necessary. (2 Page on Contracts, sec. 789, and cases there cited.) The right to recover is governed by principles of equity although the action is at law. The action is maintainable in all cases where one person has received money or its equivalent under such circumstances that in equity and good conscience he ought not to retain it and which *ex æquo et bono* belongs to another. (*Jackson v. Hough*, 38 W. Va. 236; *Merchants' Bank v. Barnes*, 47 L. R. A. 737.) A few cases illustrating the application of the principle under con-

sideration will be sufficient to enable us to determine the question now under discussion.

Where A receives money from X which belongs to B, without B's consent, the general rule is that in the absence of special circumstances B may recover such money from A. (*United States v. Bank*, 96 U. S. 30.) Where a sheriff retains money which he claims to be due him as commission but which legally belongs to a board of education, he is liable in an action for money had and received. (*Socorro Board of Education v. Robinson*, 7 N. M. 231.) A public quasi corporation, such as a county, which receives taxes and applies them all to its own use when it should pay bonds issued by the town out of such taxes, is liable to such town therefor. (*Strough v. Jefferson County*, 119 N. Y. 212; 23 N. E. Rep. 552.) Where a county receives money belonging to other persons without authority it must refund to such persons. (*Chapman v. County of Douglas*, 107 U. S. 348.) Where taxes are paid to a county by a sheriff when they should have been paid to a city, the city may recover such taxes from the county. (*Salem v. Marion County*, 25 Ore. 449; 36 Pac. Rep. 163.) Where a county is divided and the original county is legally entitled to the taxes when the division was made but which had not been then paid but the State official through whose hands such taxes passed paid a part thereof to the new county, the original county may recover such taxes from the new county. (*Colusa County v. Glen County*, 117 Cal. 434; 49 Pac. Rep. 457.) Where a stockholder receives dividends from a corporation which he knows to be insolvent and that such dividends are paid out of the capital of the corporation, he may be compelled to re-pay such dividends in an action brought by the receiver of the company. (*Warren v. King*, 108 U. S. 389.) Where a school trustee expends money for the actual benefit of township schools which by law he is required to pay over to another school corporation, such township is liable to such corporation

for the amount of money thus expended. (*Center School Township v. School Comrs.* 150 Ind. 168; 49 N. E. Rep. 961.) In *State v. St. Johnsbury*, 59 Vt. 332, it was held that where fines were improperly paid to a village instead of the county clerk for the use of the State, an action for money had and received was maintainable by the State against the village. This case reviews many cases, both English and American, and reaches the conclusion that the action was properly brought, and that no privity other than that implied by law was necessary.

The facts in the case at bar are, that appellant received from the collectors of taxes the money here sought to be recovered. At the time this money was paid over by the collectors and received by appellant there was in the statute a provision which, had it been valid, would have settled the right of appellant to this money. The statute, however, under which this money was received by appellant has been declared unconstitutional. To be sure, the decision of this court declaring said statute unconstitutional was rendered after the money had been paid over to appellant, but this circumstance does not affect the legal status of the parties in the least. The rule is universal that an unconstitutional law confers no right, imposes no duty and affords no protection. It is in legal contemplation as though no such law had ever been passed. (*Norton v. Shelby*, 118 U. S. 425.) There being no question of wrongful intention on the part of anyone in connection with this transaction, the unconstitutional statute must be eliminated from all consideration. With this statute out of view the situation is simplified. We merely have the case of the collectors of taxes voluntarily paying to the appellant, and the appellant voluntarily receiving, public funds which under the law belong to Bloomington township. The money in question must be conclusively presumed to have been levied and paid by the tax-payers for the benefit of the only municipality that had a legal right to receive it. The equitable right to this fund

follows the legal title thereto. Applying the foregoing principles to these facts, we have no hesitation in coming to the conclusion that an action of assumpsit for money had and received to the use of appellee is maintainable to recover the money in question, and that it is not necessary that there should be any privity whatever between the parties other than such privity as is implied by law, to warrant a recovery.

Appellant has cited and relies on four decisions of the Appellate Court of this State to sustain the proposition that an action for money had and received cannot be maintained in any case unless there is privity in fact between the parties. These cases are *Town of Rushville v. President of Rushville*, 39 Ill. App. 503, *City of Charleston v. Commissioners of Highways*, 52 id. 41, *School Directors v. School Trustees*, 61 id. 89, and *City of Olney, v. Gaddis*, 90 id. 622. These cases are in point, but they are out of line with the weight of authority on this subject and contrary to the underlying principle governing actions for money had and received. If these decisions were authoritative we might feel called upon to examine them more critically, but since they are not authority except in the cases wherein they were rendered, no necessity exists for any extended discussion of them.

There is nothing in the cases of *Trumbull v. Campbell*, 3 Gilm. 502, *Hall v. Carpen*, 27 Ill. 386, and *Carpen v. Hall*, 29 id. 512, when carefully analyzed, that conflicts with the views herein expressed. The views which we have herein expressed are supported by numerous decisions of this court: *Taylor v. Taylor*, 20 Ill. 650; *Allen v. Stenger*, 74 id. 119; *Barnes v. Johnson*, 84 id. 95; *School Directors v. School Directors*, 105 id. 653; *Lafin v. Howe*, 112 id. 253; *Chemical Nat. Bank of Chicago v. City Bank of Portage*, 156 id. 149; *Wilson v. Turner*, 164 id. 398; *First Nat. Bank of Springfield v. Gatton*, 172 id. 625.

Appellant contends that the court erred in allowing a recovery for the taxes levied and collected under section 14 of the Road and Bridge law because of certain alleged defects in the certificate of the highway commissioners respecting the existence of a contingency. Conceding, for the sake of argument, that the certificate was defective under the decisions of this court, we are of the opinion that appellant is not in a position to take advantage of such defect. If the tax-payers saw proper to waive any objection that might have been made by them to the form of the certificate and voluntarily paid the taxes and such taxes came into the treasury of appellant, it cannot now be heard to say that said taxes were illegally levied. *Yates v. Royal Ins. Co.* 200 Ill. 202; *City of Chicago v. McGovern*, 226 id. 403; *Illinois Glass Co. v. Telephone Co.* 234 id. 535.

The appellant contends that the court erred in allowing \$1384.93 interest upon the amount of money paid to the city. In our opinion this error is well assigned. There is nothing in this record to impeach the good faith of appellant in the receipt and expenditure of this money. While it did not belong to the city, the existence of the third proviso in section 16 of the Road and Bridge law was an apparent authority for the receipt of this money by the city. There is no element of tort connected with the receipt or conversion of this money nor has there been any vexatious delay in paying it over to appellee. There is therefore no legal ground upon which the claim for interest can be sustained. Appellee in its brief virtually concedes the error in this respect, and suggests that if this court should conclude that the interest item was improperly included in the judgment a *remittitur* of that amount will be made. The amount of the judgment below was \$30,037. The amount is not in question except as to the item of interest. A *remittitur* of \$1384.93 will be considered as entered by appellee and the judgment below affirmed for \$28,652.61.

Judgment affirmed in part.

ROSS R. DONOVAN, Admr., Plaintiff in Error, *vs.* JO MAJOR *et al.* Defendants in Error.

Opinion filed December 21, 1911—Rehearing denied Feb. 8, 1912.

1. **PRESUMPTION OF DEATH**—*when presumption of death arises.* The unexplained absence of a person from home without having been heard from for seven years by those who would naturally have heard from him if he had been alive, though diligent efforts have been made to find him, raises a presumption of death, subject, however, to be rebutted by facts or circumstances sufficient to overcome it or by a conflicting presumption.

2. **SAME**—*time when it is presumed death occurred.* Where a person has disappeared and has not been heard from for seven years his death is to be regarded as having taken place seven years from the date of his disappearance, unless there are facts and circumstances proven which are sufficient to justify an inference that he died at an earlier date; and upon this question his health, habits, age, disposition, manner of life, pecuniary circumstances and family relations may be considered.

3. **SAME**—*what does not justify inference that death occurred before seven years.* The mere disappearance of a strong, healthy, vigorous boy fifteen years of age, of a cheerful disposition and fond of sightseeing, not involved in trouble of any kind or engaged in any perilous occupation or having any defect of eyesight or hearing, is not sufficient to raise any presumption of fact that his death occurred before seven years from the date of his disappearance.

4. **EXECUTORS AND ADMINISTRATORS**—*administration may be granted upon proof raising a presumption of death.* Where the facts exist from which a presumption of death arises the absent person is presumed to be dead for all purposes and in all courts, and letters of administration may be granted upon a petition setting forth such facts; and while the grant of administration will be of no validity if the absent person afterward appears, it is valid and binding unless that event occurs.

5. **TRUSTS**—*trustees of an absent person must be indemnified in case of administration.* Where administration is granted upon a petition setting up the facts upon which the legal presumption of death arises, any decree which may be rendered requiring the trustees of such absent person to pay over the fund to the administrator should require security for the indemnification of the trustees against loss by reason of any claim or demand of the absent person or any person claiming through or under him.

WRIT OF ERROR to the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Woodford county; the Hon. GEORGE W. PATTON, Judge, presiding.

JOSEPH D. IROSE, ED E. ROBESON, and JULIUS C. GREENBAUM, for plaintiff in error.

THOMAS KENNEDY, for defendants in error Jo Major *et al.* trustees.

ORMAN RIDGELY, for defendants in error Howard M. Leonard and Eugene B. Dickinson, conservators.

Mr. JUSTICE DUNN delivered the opinion of the court:

By the will of Mary E. Major, who died in 1890, a share of her estate was directed to be held in trust for the descendants of her deceased daughter, Katherine Wright, the income to be applied to their support and education until they should, respectively, reach the age of twenty-one years and the principal then to be paid to them. In case any such descendant should die before reaching the age of twenty-one years, it was directed that the share to which such descendant would have been entitled had he or she lived should be given to his or her brothers and sisters. Mrs. Wright's descendants were two sons, Will C. and Guy. She had died some years before her mother, and her husband had married again. Four children were born of this second marriage. Will C. Wright lived with his father and step-mother in Chicago, and, being then a few months past fifteen years old, disappeared from his home on April 15, 1893, and has never since been heard from. The question involved in this controversy is the disposition of his share in his grandmother's estate under her will. The will has been entirely executed except as to this trust, and one-half of the fund was paid to Guy Wright upon his becom-

ing of age, but the trustees still retain the remainder of the fund because they do not know to whom it should be paid. On July 28, 1908, Guy Wright filed a bill in the circuit court of Woodford county for the purpose of having the trustees directed to pay to him the share of his brother, Will C. Wright, on the ground that the latter had died before reaching the age of twenty-one years, and his share should, therefore, under the will, be paid to the complainant. On August 11, 1908, the plaintiff in error was appointed administrator of the estate of Will C. Wright by the probate court of Cook county, and later by leave of the court became a party defendant, answered the bill and filed a cross-bill. His claim was that Will C. Wright became of age in 1898 and was then entitled to his share of the funds in the hands of the trustees, and that his administrator is now entitled to such funds. After the commencement of the suit a conservator was appointed for Guy Wright, and the suit thereafter proceeded in the name of the conservator. On a hearing upon the evidence the court found that Will C. Wright died before reaching the age of twenty-one years, dismissed the cross-bill and decreed that the executors should file an account and pay the amount in their hands to the complainant in the original bill, on his giving a bond to indemnify them in case Will C. Wright should return. The administrator appealed to the Appellate Court for the Second District, which affirmed the judgment, and the record has been brought here by *certiorari* for review.

The rights of the parties depend upon the death of Will C. Wright and the date of its occurrence. There is no direct evidence of his death, but proof of that fact rests only upon the presumption which the law raises from his unexplained absence from his home without having been heard from for seven years by those who would naturally have heard from him if he had been alive, though diligent efforts have been made to find him. Under these circumstances a presumption of death arises, subject, however, to

be rebutted by facts or circumstances sufficient to overcome it or by a conflicting presumption. (*Whiting v. Nicoll*, 46 Ill. 230; *Johnson v. Johnson*, 114 id. 611; *Reedy v. Millizen*, 155 id. 636; *Hitz v. Ahlgren*, 170 id. 60; *Policemen's Benevolent Ass'n v. Ryce*, 213 id. 9; *Kennedy v. Modern Woodmen of America*, 243 id. 560.) "As held by the courts of this country the doctrine is, that a person once found to be alive is presumed to continue to live until there be proof of the contrary. At the end of seven years from the time he was last heard of, the presumption of life ceases and the opposite presumption, of death, takes its place. The legal presumption, as we understand from the decisions quoted by appellee, establishes not only the fact of death, but also the time at which the person shall first be accounted dead. This is an arbitrary presumption but rendered necessary on grounds of public policy, in order that rights depending upon the life or death of persons long absent and unheard of may be settled by some certain rule." (*Whiting v. Nicoll*, *supra*.) The conclusion to be drawn from the record, in accordance with this presumption, is that Will C. Wright is to be regarded as dead on the fifteenth day of April, 1900, and not before, unless evidence of facts and circumstances appear sufficient to justify the inference that he died at an earlier date. The circuit court found that he died shortly after his disappearance, on April 15, 1893, and before he became twenty-one years of age, and the Appellate Court has approved this finding.

The evidence shows that Will C. Wright was born November 25, 1877. From 1889 until 1893 he lived with his father, step-mother and three half brothers in Chicago. His relations with his family and relatives were pleasant and agreeable. He was a strong, healthy boy, large for his age, and his general health, eyesight and hearing were good. He did not like to go to school and for several years had been working at different jobs, but not long at a time, and

had been permitted to spend the money which he earned. He left his father's home on the morning of April 15, 1893, taking his dinner with him, ostensibly to go to his work as an office boy, at which he had been engaged for several days. He did not return in the evening and a search was instituted for him. The police were notified but were unable to find him. Advertisements were published for him at various times in the daily papers of Chicago, Milwaukee, St. Louis and San Francisco, but without results. At the time he left home he was not in trouble of any kind. He had a common school education and was able to read and write. It may be assumed that he had had a copy of his grandmother's will and knew its contents. The executors had purchased some clothing for him, and he knew that this was done out of the funds of his grandmother's estate, and that upon reaching the age of twenty-one years he would be entitled to a share of that estate. These are the facts relied upon to sustain the finding that he died before the expiration of seven years from his disappearance, and they are not sufficient.

The presumption of the continuance of life prevails until facts are shown which make the presumption of death more reasonable. Disappearances of individuals are not uncommon, and no legal presumption of death arises from the disappearance, alone. The presumption of fact which will justify the conclusion of death before the lapse of the time required for the legal presumption must arise from evidence of circumstances tending to show death. That the absentee was exposed to some specific peril; that he sailed in a vessel which had never been heard from, though many months overdue; that he was last seen as a passenger on an ocean steamer in midocean, at night, and was never seen or heard of afterward though diligent search was made the next morning; that he made threats to commit suicide prior to his disappearance; that the condition of his health was desperate; that he was afflicted with some disease likely to

undermine his constitution,—these are circumstances which may be considered as tending to raise a just inference of death. The health, age, habits, disposition, manner of life, pecuniary circumstances and family relations of a person who has disappeared are all proper for consideration in determining whether he probably died before the expiration of seven years. Here no circumstances are shown from which a legitimate inference of death can be drawn. A vigorous, large, healthy, fifteen-year-old boy, of a cheerful disposition and fond of sightseeing, about the beginning of the World's Fair in Chicago left his home suddenly and without warning and did not come back. Such an act would, of course, give his family occasion for apprehension but not necessarily of death. Of itself it could create at the time no presumption of his death, and it could not grow into a presumption unless aided by proof of other circumstances, none of which appear in this case. It is at least as probable that he voluntarily ran away from home and may yet be living, as that he met with an accident or sickness and death which were not communicated to his family.

The trustees under Mrs. Major's will insist that the probate court of Cook county was without jurisdiction to administer upon the estate of Will C. Wright because it appeared that the application for letters of administration was based upon the presumption of death arising from the supposed decedent's absence. When the presumption of death arises the absent person is presumed to be dead for all purposes and in all courts. The petition for letters set out the facts in regard to the disappearance of Will C. Wright, followed by the statement that the petitioner believed, and therefore stated, that he was dead. Thereupon the court, acting upon the evidence before it, found that Will C. Wright was dead and granted administration of his estate. It is true that if he shall afterward appear this grant of administration will be of no validity, but until that event does happen the administration is valid and binding. The

fact that the death is proved, not by direct evidence but by the proof of facts from which death is presumed, does not affect the validity of the proceeding. The trustees should not, however, be obliged to run the risk of the future appearance of Will C. Wright, and in any decree which may be rendered for the payment of this fund to his administrator, security should be required for their indemnification against loss by reason of any claim or demand of Will C. Wright or of any person claiming through or under him.

The judgment of the Appellate Court and the decree of the circuit court will be reversed and the cause remanded to the circuit court.

Reversed and remanded.

WILLIAM ROUTT, Trustee, Appellee, *vs.* CHARLES S. NEWMAN, Appellant.

Opinion filed December 21, 1911—Rehearing denied Feb. 8, 1912.

1. **WILLS**—*when bequest is one of income and not rent charge or annuity.* Where the legal title to certain lands is devised to a trustee for the life of the survivor of four sons, with a contingent remainder in fee to those who should then be the heirs of the body of the testatrix, or in default of such heirs to her heirs generally, and the trustee is directed to manage the property and after paying the expenses of management out of the rents and profits to pay one-fourth of the remaining income to each of the four sons, the bequest is one of income and not a rent charge or annuity.

2. **SAME**—*annuity defined.* An annuity, technically, is a certain yearly sum granted to a person in fee or for life or years, chargeable only on the person of the grantor, but in a broader sense the term is used to designate a fixed sum payable periodically, subject to such limitations as the grantor may impose, and it may be chargeable on real estate as well as on the person.

3. **SAME**—*when time for paying share of income is limited to life of recipient.* Though a will creating a trust in the income of certain property for the four sons of the testatrix until all are dead provides that the share of any son dying during the continuance of the trust shall go to his children during the continuance of the trust, and if he has no children then one-half shall go to the widow during the continuance of said trust, yet if it is also

provided that any person who shall become the recipient of the remaining income "shall have the same paid to him, her or them in cash and in person into their hands," the continued existence of the recipient is an essential element of the gift, and upon the death of a child, during the continuance of the trust, who has been the recipient of the income through his father's death, his interest ceases and does not pass to his mother for the remaining period of the trust.

CARTER, C. J., and FARMER and COOKE, JJ., dissenting.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. CHARLES M. WALKER, Judge, presiding.

ANGUS ROY SHANNON, for appellant.

DYRENFORTH, LEE, CHRITTON & WILES, (GEORGE A. CHRITTON, and STUART D. WALLING, of counsel,) for appellee.

Mr. JUSTICE DUNN delivered the opinion of the court:

The will of Caroline Newman devised certain real estate to William Routt in trust, to rent, make reasonable repairs, pay taxes and assessments, insure, and to pay the remaining income to her four sons, Harvey R., Benjamin L., Charles S. and Henry J., one-fourth to each in person, and not upon any written or verbal order or upon any assignment or transfer by either or any of her sons. The will then proceeds as follows:

"Second *b*—Upon the decease of either or any of my said sons during the continuance of this trust, his share of the remaining income shall go to the child or children of his body during the continuance of this trust, and in case said son leaves him surviving no lawful child or children of his body, then one-half of his said share shall go to his surviving widow (during her lifetime) during the continuance of said trust, and the other half of his said share shall

go equally among my surviving sons during continuance of said trust, and in case said son leaves him surviving no lawful child or children of his body and no widow, then his share shall be divided equally among my surviving sons during the continuance of said trust. Any person under the terms of this said trust who shall become the recipient of the said remaining income, or any portion thereof, shall have same paid to him, her or them in cash and in person into their hands, and not to be paid upon any written or verbal order nor upon any assignment or transfer by any such person.

"Third c—This trust is to continue until all of my said sons will have become deceased and then to cease and be determined.

"Fourth d—At the termination of this said trust the said lands and buildings thereon shall vest in the heirs of my body then living, *per stirpes*, and in default of such heirs to vest according to the laws of the State of Illinois now in force."

The residue of the testatrix's property was devised to the four sons. By a codicil the testatrix afterward withdrew a part of the real estate mentioned from the operation of the trust and devised it specifically in fee simple to the four sons. After the death of the testatrix Harvey R. Newman died, leaving no child or widow; then Henry J. Newman died, leaving Charlotte L. M. Newman, his widow, and one child, Richard W. Newman; then Benjamin L. Newman died, leaving a widow and no children; and afterward Richard W. Newman, the son of Henry J. Newman, died at about the age of thirteen years, leaving his mother, Charlotte L. M. Newman, his only heir. The trustee having filed a bill asking for the appointment of a trustee as his successor and the taking of an account, all the parties in interest were brought into court, and the question was presented whether, under the will of Caroline Newman, Charlotte L. M. Newman was entitled, upon the death of her son, to

receive, during the continuance of the trust, the portion of the net income which her son would have received had he lived. The circuit court of Cook county decided this question in her favor, and the Appellate Court affirmed the decree and granted a certificate of importance and appeal to Charles S. Newman.

Neither the lands nor the rents and profits were devised to the sons of the testatrix. The legal title of the lands was devised to the trustee for the life of the survivor of the four sons, with a contingent remainder in fee to those who should then be the heirs of the body of the testatrix, and in default of such heirs of the body then to her heirs generally. The management of the property was also given to the trustees, and only the remainder, after paying out of the rents and profits the expenses of such management, was directed to be paid to the sons. The net income thus directed to be paid to the sons was neither a rent charge, (*DeHaven v. Sherman*, 131 Ill. 115,) nor an annuity. An annuity, technically, is a certain yearly sum granted to a person in fee or for life or for years, chargeable only on the person of the grantor. It is used in a broader sense to designate a fixed sum payable periodically, subject to such limitations as the grantor may impose, and it may be charged on real estate as well as on the person. (2 Am. & Eng. Ency. of Law, 387.) The sums directed to be paid to the sons are not fixed and the payments are not periodical. The bequest is only one of income, whatever the amount may be and whenever it may be paid. (*Pearson v. Chase*, 10 R. I. 455; *Bartlett v. Stater*, 53 Conn. 102; *Whitson v. Whitson*, 53 N. Y. 479.) There may be no material difference in the rights of the parties in this case whether the bequest is of income or of an annuity, but counsel for the appellant has stated in his petition for a rehearing that the appellant's whole case is based upon the fact that it is an annuity.

The words of the will to be construed are, "upon the decease of either or any of my said sons during the continuance of this trust, his share of the remaining income shall go to the child or children of his body during the continuance of this trust." In their ordinary sense they seem to indicate clearly enough that the child, under those circumstances, shall receive the income until the death of the last of the sons shall terminate the trust; and this view is strengthened by the fact that in the same sentence and in the immediately succeeding clause it is said, "and in case said son leaves him surviving no lawful child or children of his body, then one-half of his said share shall go to his surviving widow (during her lifetime) during the continuance of said trust," indicating that the question of the continued life of the second taker after the death of a son had the consideration of the testator. There is, however, other language in the will entirely inconsistent with the continuance of the payment of the income to the representative of a deceased child of one of the sons. It is provided that "any person under the terms of this said trust who shall become the recipient of the said remaining income, or any portion thereof, shall have same paid to him, her or them in cash and in person into their hands, and not to be paid upon any written or verbal order nor upon any assignment or transfer by any such person." The continued existence of the recipient of the fund was necessary to a compliance with this requirement. The portion of testatrix's property included in the trust was manifestly intended to be placed beyond the reach of creditors of the beneficiaries, and that object was an important part of her scheme. She gave other property to her sons in fee simple, but the control of this portion she intended should be so restricted that neither the land itself nor the income could be reached by any creditors during the lifetime of any of her sons. The language quoted is first used in regard to the sons and is then repeated as applying to their children, and in our judgment

limits the time during which a share of the net income shall be paid to any child of a son, to his lifetime.

It might be said that this language does not exclude Charlotte L. M. Newman, but only makes payment of the income to her subject to the same terms as the payment to her son. But Charlotte L. M. Newman cannot become the recipient of the income under the terms of the trust. She is not mentioned in the will nor is she within any class mentioned in the will. If she receives any part of the income it is as the next of kin of her son, to whom, only, it is given under the terms of the trust. If the payment to her son does not terminate with his death, then such payment must be made to an administrator, who would then be the recipient under the terms of the trust, and would administer the sum received from the income, together with all the assets of the estate, according to law, and pay it, without restriction, to the persons entitled to receive it. It happens that the son here died during his minority, but this cannot affect the character of his interest. Had he been an adult, able to contract debts, the effect of the continuance of the payment of the income after his death would have been to subject the income to the payment of his creditors. This would be a manifest perversion of the intention of the testatrix, by the creation of the trust, to prevent this very thing.

The question arose upon demurrer to the cross-bill of Charlotte L. M. Newman. Her claim, under the will, to the whole of the share of her son, as his representative, cannot be sustained. The four-twelfths parts of the income which he was receiving at his death not having been disposed of beyond his lifetime, the remainder thereof, during the life of Charles S. Newman, descended to the heirs of the testatrix. The record does not show who those heirs were. Whether there were other children than the four sons, or children of deceased children, does not appear. We cannot, therefore, direct what decree should be entered.

The decree is reversed and the cause remanded, with directions to sustain the demurrer to the amended supplemental cross-bill and for further proceedings in conformity with this opinion.

Reversed and remanded, with directions.

CARTER, C. J., and FARMER and COOKE, JJ., dissenting.

THE PEOPLE *ex rel.* Charles R. Scoon, County Collector,
Appellant, *vs.* THE CHICAGO AND ALTON RAILROAD
COMPANY *et al.* Appellees.

Opinion filed December 21, 1911—Rehearing denied Feb. 17, 1912.

1. MUNICIPAL CORPORATIONS—*object of constitutional prohibition against incurring indebtedness.* The object of the prohibition of the constitution against incurring indebtedness is to protect the property of citizens from being burdened beyond five per cent of its value, as ascertained by the assessment for State and county taxes, with any indebtedness extending into the future; and any plan or scheme which has the effect of creating such a burden is prohibited by the constitution.

2. SAME—*the prohibition against incurring indebtedness is not against the rate of tax.* The constitutional prohibition against incurring indebtedness is not against the rate of tax and does not limit the rate of taxation by which improvements may be made or the obligations of municipal corporations be met, but the prohibition is against voluntarily incurring an indebtedness in any manner or for any purpose, and it makes no difference under what guise the attempt is made or what form the proceeding takes.

3. SAME—*legislature may authorize municipal corporations to levy taxes sufficient for all purposes.* The legislature has power to authorize municipal corporations to raise money by taxation sufficient for the performance of all their duties, including the making of local improvements; and hence the mere fact that a city has reached the constitutional limit of indebtedness does not preclude it from levying taxes for any corporate purpose, within the limits fixed by the statute.

4. SAME—*bonds to pay city's share of cost of improvement are an indebtedness.* The mere fact that a city is indebted to the con-

stitutional limit is not ground for refusing confirmation of an assessment for an improvement to be paid for, in part, by general taxation, if it does not appear that the city has incurred any debt with respect to its share of the expense; but the issuing of bonds payable in the future by general taxation is an incurring of indebtedness within the meaning of the constitution, and it makes no difference that the bonds are payable out of a special fund. (*Jacksonville Railway Co. v. Jacksonville*, 114 Ill. 562, distinguished.)

5. *SAME—improvement bonds cannot be said to constitute benefits to property rather than indebtedness.* The claim that improvement bonds payable in the future by general taxation do not constitute an indebtedness of the city because the whole city is to be regarded as a single district benefited by the improvement, in which all property is benefited in an equal ratio equivalent to the tax levy, cannot be sustained, since a general tax is against personal property and is collectible from the individual owners of such property, while benefits are chargeable only to real estate and must be collected from the property.

6. *REHEARING—parties must abide by facts presented when the case was submitted.* If one party asserts as a fact that a city has issued bonds for its share of a special assessment and the statement is not denied by the other party and there is nothing in the record to show whether the statement is true or not, the court is justified in accepting the statement as true in rendering judgment, and the parties must abide by the judgment upon the facts as presented to the court when the case was submitted for decision.

APPEAL from the County Court of Marshall county;
the Hon. D. H. GREGG, Judge, presiding.

HENRY JACOBS, State's Attorney, and J. A. RIELY, for
appellant.

SILAS H. STRAWN, WINSTON, PAYNE, STRAWN &
SHAW, and BARNES & MAGOON, for appellees.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the
court:

The city council of the city of Toluca, in Marshall county, passed an ordinance for an extensive system of sidewalks, to be paid for by special assessment. In the proceeding instituted in the county court for the purpose of

assessing benefits the city was assessed \$8110.14 for public benefits and the balance of the cost of the improvement was assessed to owners of property. Bonds were issued by the city for the amount assessed to it, to be paid by general taxation. The city was then indebted in excess of five per centum of the value of the taxable property therein as ascertained by the last assessment for State and county taxes previous to the issue of the bonds. In 1910 a tax was levied for the payment of \$4000 of the bonds and \$240 interest, to which was added two per cent of the bond and interest levy, amounting to \$85. The right of way of the appellant the Toluca, Marquette and Northern Railroad Company was delinquent for this tax, and the other appellant, the Chicago and Alton Railroad Company, having purchased the railroad, objections were filed in the name of both railroad companies to the application of the county collector to the county court for judgment. The facts were stipulated, and it was agreed that there was only one question to be decided in the case, which was, whether the amount assessed against the city, and for which the bonds were issued, was a part of the five per cent indebtedness specified in section 12 of article 9 of the constitution. It was agreed that if the bonds were an indebtedness within the meaning of the constitution the tax was to be held void, but if it was not to be so considered the tax was to be held good. The court decided that the amount remaining unpaid, for which bonds of the city were issued, was a debt of the city in the sense of the constitutional limitation and that the tax was void for that reason. Judgment was refused, and appellant excepted and appealed to this court.

The prohibition of the constitution is against voluntarily incurring an indebtedness in any manner or for any purpose, and it makes no difference under what guise the attempt is made or what form the proceeding takes. The object is to protect the property of citizens from being burdened beyond five per cent of its value, as ascertained by

the assessment for State and county taxes, with any indebtedness extending into the future, and any plan or scheme which has the effect of creating such a burden is prohibited by the constitution. The prohibition is not against the rate of a tax and does not limit the rate of taxation by which improvements may be made or the obligations of the municipal corporation be met. (*Village of East Moline v. Pope*, 224 Ill. 386; *Schnell v. City of Rock Island*, 232 id. 89.) The General Assembly has power to authorize municipal corporations to raise moneys by taxation sufficient for the performance of all their duties, including the making of local improvements. Accordingly, when the question whether the fact that a city had already reached the limit of indebtedness could be shown to prevent the confirmation of an assessment for a local improvement to be paid for in part by general taxation came before the court in *Jacksonville Railway Co. v. City of Jacksonville*, 114 Ill. 562, the court decided that it could not. That was an appeal from a judgment confirming a special assessment, and an objector had offered to show, on the trial in the county court, that the indebtedness of the city exceeded the constitutional limitation. On the appeal it was contended that the ordinance was void as creating an indebtedness, but the court said that no question as to the power of the city to incur a debt was presented by the record, and said: "It does not appear from anything before us that the city has ever asked anyone to credit it on account of the proposed improvement. It has not incurred a debt in respect to it, nor is it threatening to do so. The city simply proposes to raise its share of the expenses by general taxation. It is not even attempting to anticipate a tax levy. Should it fail to raise the money in the manner proposed, and it should then attempt to borrow it or to hire some one to do the work on the city's credit, then, upon the complaint of a tax-payer, the constitutional provision referred to might be invoked, but until then no question of that kind can arise. It may

be assumed that if the city finds it cannot raise its share of the necessary funds by taxation, as contemplated in the ordinance, it will abandon the enterprise altogether, rather than attempt to raise it in violation of the constitution." The city of Jacksonville was not prohibited by the constitution from raising money by taxation to make a local improvement. The fact that a municipal corporation has incurred an indebtedness up to the full limit allowed by the constitution does not preclude it from levying taxes for any legal corporate purpose within the limits fixed by the statutes, and that rule was applied to a tax for building a school house in *People v. Chicago and Texas Railroad Co.* 223 Ill. 448, but every municipal corporation is prohibited, in the language of the constitution, from borrowing money or becoming indebted beyond the limitation, "in any manner or for any purpose." In the case of *Stone v. City of Chicago*, 207 Ill. 492, a bill was filed to enjoin the issue and sale of bonds, and it was claimed that an item of "public benefits due from city April 30, 1901, as per verbal report Haskins & Sells, \$1,744,347.02," was a part of the existing indebtedness of the city of Chicago. That was not an item of bonds or certificates or other form of indebtedness payable in the future, but, like the case of the city of Jacksonville, for aught that appeared it might be paid by taxation. It was held, under the authority of the Jacksonville case, that the public benefits due from the city according to some verbal report was not a debt of the city in the sense of the constitutional limitation. There has been no decision of this court that bonds payable in the future by general taxation are not an indebtedness, but in the Jacksonville case it was implied that an attempt to borrow money would be a violation of the constitution. It makes no difference, in determining the question whether there is an indebtedness, that it is payable out of a special fund, since all bonds issued by a municipal corporation are, in effect, payable out of a special fund; (*Village of East Moline v. Pope, supra*;

Schnell v. City of Rock Island, supra;) nor that there should be a right of action against the municipal corporation; (*City of Joliet v. Alexander*, 194 Ill. 457; *Lobdell v. City of Chicago*, 227 id. 218;) nor that a city acquiring property encumbered by a mortgage indebtedness shall assume or agree to pay the mortgage debt. (*Evans v. Holman*, 244 Ill. 596.) The bonds issued by the city of Toluca are its obligations equally with any other sort of bond that may be issued payable by general taxation, and the obligation created thereby can have no other name than that of an indebtedness.

Counsel for appellant argue that there is no indebtedness because the whole city is to be regarded as a single district benefited by the improvement; that all property is benefited in an equal ratio equivalent to the tax levy, and that the property pays for the benefit just the same as property specially assessed. If this argument were otherwise sound it overlooks the obvious fact that the general tax is against personal property and collectible from individual owners of such property, while benefits to property can only be chargeable to real estate and be collected from the property.

We are also asked to declare that the bonds are not an indebtedness, because these bonds, and other similar bonds of other cities, have been purchased on the faith of previous decisions of this court. We do not understand that there has been such a decision, and consequently there is no question of the necessity or propriety of adhering to a decision which was, in fact, incorrect.

The judgment is affirmed.

Judgment affirmed.

Subsequently, on petition for rehearing, the following additional opinion was filed:

Per CURIAM: The appellant asks for a rehearing upon the ground that we misapprehended a fact in the case. The supposed misapprehension is, that we understood that the

city of Toluca issued its bonds for the amount assessed against it on account of public benefits, when, in fact, no bonds were issued. The transcript of the record does not show that bonds were issued or were not issued, the stipulation upon which the cause was heard being as follows: "The city of Toluca has been assessed in a special assessment proceeding in this court \$8110.14 for the construction of a local improvement,—that is, the construction of sidewalks. It has been assessed that much for public benefits to the city, the property owners having been assessed the balance of the costs of that improvement. At the time the appropriation for this tax was made the city of Toluca was indebted, for bonds and general purposes, in the sum of five per cent of its assessed valuation over and above what it has been assessed on account of this improvement. Now, then, if the amount assessed to the city of Toluca for public benefits in that assessment proceeding in this court should be considered as part of the five per cent indebtedness against the city, as mentioned in section 12 of article 9 of the constitution, then this tax to be void, but if it is not to be considered as part of the five per cent mentioned in that section of the constitution then it is to be held good."

The "Statement of the case" in the brief and argument for the appellees, after stating the indebtedness of the city and the special assessment, contained the following: "The sidewalks were laid down by special assessment, one-half of which special assessment was assessed against the city for supposed general benefits that the city would acquire because thereof, and the other half was assessed against the property along which the sidewalks were laid. The amount so assessed against the city was \$8110.14. Bonds were issued and floated anticipating the collection of this special assessment against the property owners and against the city's one-half. These bonds, it is understood, were taken by the contractor in payment for his work. * * * The railroad companies claim that said bonds were void because

they were an indebtedness within the meaning of section 12 of article 9 of the constitution of the State and were in excess of the five per cent limitation of indebtedness imposed by said section of article 9, and that the tax sought to be levied to pay interest on these void bonds was likewise void for the same reason. * * * The record presents but a single question, viz., is the tax valid or void because of the fact that it was levied to pay interest and principal upon bonds issued to pay the city's one-half of this special assessment for these sidewalks, when issued at a time that the city was indebted in excess of the five per cent allowed by the State constitution?"

These statements that bonds were issued and that the question to be decided was concerning their validity were not questioned in any manner by counsel for appellant, but the cause was submitted for decision on the briefs and arguments of the respective parties. If the statements were incorrect it was the duty of counsel for appellant to advise the court of the error and make the needed correction. It was not a misapprehension of the facts appearing to the court to decide the case as submitted upon the assumption that bonds were issued. The transcript of the record does not show that the statements of counsel respecting the issuing of bonds were untrue or incorrect, and we cannot now determine from the record that bonds were not issued. Whether the fact now alleged would make any difference in the decision of the case cannot be considered, but the parties must abide by the judgment upon the facts as presented to the court when it was submitted for decision.

The rehearing is denied.

Rehearing denied.

WILLIAM D. STEIN *et al.* Defendants in Error, *vs.* ISAAC MEYERS, Plaintiff in Error.

Opinion filed December 21, 1911—Rehearing denied Feb. 15, 1912.

1. APPEALS AND ERRORS—the Supreme Court has jurisdiction if construction of constitution is involved. Under section 118 of the Practice act appeals from and writs of error to city courts must be taken directly to the Supreme Court where the construction of a constitutional provision is involved.

2. SAME—how construction of provision of constitution arises. The construction of a constitutional provision usually arises out of comparison of such provision with a statute claimed to be in conflict therewith; but if the provision is self-executing the question of its construction generally arises when it is sought to apply the provision to a given state of facts.

3. SAME—when construction of provision of constitution is involved. Whether a given collection of abbreviations and letters entered by the clerk of the municipal court upon the record as a judgment of the court amounts to a judgment in the English language, as required by section 18 of the schedule of the constitution, is a question which involves a construction of such provision.

4. CONSTITUTIONAL LAW—section 62 of Municipal Court act is not in violation of section 18 of schedule of constitution. Section 62 of the Municipal Court act, which authorizes the chief justice of that court to prescribe abbreviated forms of entries of orders, is not of itself in violation of section 18 of the schedule of the constitution, requiring all judicial proceedings to be conducted and preserved in the English language, as such section 62 only authorizes the use of abbreviated forms and does not authorize the use of any other than the English language nor of unintelligible abbreviations.

5. SAME—section 18 of schedule of the constitution construed. Section 18 of the schedule of the constitution, providing that all judicial proceedings must be conducted and preserved in the English language, requires that the letters be formed into words which are known as a part of that language, and that those words be so used in connection with one another that they form sentences which convey some thought or meaning.

6. SAME—the constitution does not prohibit use of all abbreviations. There are some abbreviations of words which have become so well known and are so commonly used that they may be said to constitute a part of the English language within the meaning of section 18 of the schedule of the constitution.

7. SAME—*when entry of alleged judgment violates section 18 of schedule of the constitution.* An alleged judgment entered as "Fndg deft G withh prem descr in complt; judg on fndg & c," cannot be said to be in the English language, within the meaning of section 18 of the schedule of the constitution.

8. COURTS—*rule as to the entry of judgment nunc pro tunc.* A court has no right to enter a judgment *nunc pro tunc* at a subsequent term unless the judgment was in fact rendered at a previous term and was not entered of record through some fault, neglect or oversight; and in such case the fact that the court did give judgment at the previous term can only be proved by some memorial paper or minute in the case made at such former term.

9. SAME—*when judgment cannot be entered.* Judgments and records of courts cannot rest in parol or upon the recollection of the judge or any other person, and if there is no minute or memorial paper in the records of the court to show that judgment was, in fact, pronounced, no judgment can be entered.

10. SAME—*when entry of a judgment nunc pro tunc cannot be upheld.* A recital in an order of the municipal court of Chicago for the entry of a judgment *nunc pro tunc*, to the effect that the abbreviations and letters relied upon as the minute or memorial showing the judgment had been prescribed by the chief justice of that court as a sufficient abbreviated form for the judgment, can not be regarded by the Supreme Court as authorizing the entry of the judgment *nunc pro tunc*, where the entry relied upon is unintelligible in itself and the order of the chief justice prescribing the form is not introduced in evidence and preserved in the record by a bill of exceptions.

HAND, J., specially concurring; CARTER, C. J., dissenting.

WRIT OF ERROR to the Municipal Court of Chicago;
the Hon. MICHAEL F. GIRTEN, Judge, presiding.

LOUIS GREENBERG, for plaintiff in error.

STEIN, MAYER & STEIN, (PHILIP STEIN, of counsel,) for defendants in error.

Mr. JUSTICE COOKE delivered the opinion of the court:

Defendants in error brought an action of forcible detainer in the municipal court of Chicago against plaintiff in error to recover possession of certain premises in the city

of Chicago. Plaintiff in error failing to appear was defaulted, and the clerk, on February 28, 1910, entered upon the records of the court in said cause the following words, letters and characters: "Fndg deft G withh prem descr in complt; judg on fndg & c." Thereafter, on June 13, 1910, defendants in error, in accordance with notice duly served upon plaintiff in error, applied to the court for leave to amend the record of the cause, and the court thereupon, over the objection of plaintiff in error and without hearing any evidence, entered an order in which it is recited that on February 28, 1910, an order was entered in this cause in abbreviated form, in the words, letters and characters above quoted, and that said entry was in accordance with the order of the chief justice of the municipal court prescribing said entry as an appropriate and sufficient abbreviated form for the finding and judgment hereinafter quoted; that said finding and judgment order were not entered otherwise by the clerk than in said prescribed abbreviated form, and that said finding and judgment entered is the abbreviated form of the finding and judgment as pronounced and rendered by the court February 28, 1910; that said abbreviated form of finding and judgment was entered by the clerk upon the order of the court, and that the court at the same time, after hearing the evidence in the cause, made an entry of said order upon his own minutes, as follows: "February 28th, 1910, D. J. P.," which minutes represent the judgment as entered by the clerk, but that for greater security it is now deemed advisable to amend said finding and judgment order that the same may be spread upon the record fully, in accordance with the amplified form of such finding and judgment. After setting forth the above recitals the order continues as follows:

"Wherefore, the court being fully advised in the premises and having examined the order as entered by the said clerk of this court and his own minutes as made by the court at the time the said judgment was entered, on motion

of the plaintiffs, it is therefore ordered by the court that said finding and judgment order of February 28, 1910, be and the same are hereby amended *nunc pro tunc* as of February 28, 1910, so that the same shall read as follows, to-wit: 'And the court having heard the evidence and being fully advised in the premises finds the defendant guilty of unlawfully withholding from the plaintiffs the possession of the premises described in the plaintiffs' complaint herein, and that the right to the possession of said premises is in the plaintiffs. And the plaintiffs now here move the court for final judgment herein. It is therefore considered by the court that the plaintiffs have judgment herein, and that the plaintiffs have and recover of and from the defendant possession of the premises described in the complaint herein, and that a writ of restitution issue therefor. It is further considered by the court that the plaintiffs have and recover of and from defendant the costs and charges by the plaintiffs herein expended, and that execution issue therefor.' It is further ordered by the court that said finding and judgment order be entered and spread of record upon the records of this court as of February 28, 1910."

A writ of restitution was thereafter issued, and was on July 13, 1910, returned by the bailiff of the court as executed. Plaintiff in error has brought the cause to this court by writ of error, and for grounds of reversal urges that section 62 of the Municipal Court act, which authorizes the chief justice to prescribe abbreviated forms of orders, is unconstitutional; that the entry of the judgment order by the clerk in manner above quoted is in conflict with section 18 of the schedule of the constitution and void, and that the court erred in granting the motion to amend the record for the entry of a judgment *nunc pro tunc*. Defendants in error contend that the abbreviations entered as a judgment order constitute a valid judgment, and that if they do not, the *nunc pro tunc* order of June 13, 1910, was properly entered.

Plaintiff in error relies chiefly upon his contention that section 62 of the Municipal Court act is void as being in conflict with section 18 of the schedule of the constitution. That part of section 62 involved is as follows: "That it shall be the duty of the chief justice of the municipal court to superintend the keeping of the records of the said court and to prescribe abbreviated forms of entries of orders therein, which abbreviated forms so prescribed shall have the same force and effect as if the said orders were entered in full in the records of said court." Section 18 of the schedule of the constitution is as follows: "All laws of the State of Illinois, and all official writings, and the executive, legislative and judicial proceedings, shall be conducted, preserved and published in no other than the English language." It is plain that section 62 does not conflict with section 18 of the schedule of the constitution, as it does not authorize the chief justice of the municipal court to prescribe the forms of orders in any other than the English language. This section authorizes only the use of abbreviated *forms*. It does not authorize the use of any other than the English language or the use of forms containing abbreviations of words which render them unintelligible. There can be no objection to the use of abbreviated forms, and such forms may be as short as desired so long as they aptly express the orders of the court. There is nothing in section 62 that is in anywise in conflict with this section of the constitution.

A motion was interposed by defendants in error to dismiss this writ of error for want of jurisdiction, upon the ground that no constitutional question is involved. A determination of this motion was reserved until the hearing of the cause. This motion must be denied. Section 118 of the Practice act provides: "Appeals from and writs of error to * * * city courts * * * in all * * * cases in which a franchise or freehold or the validity of a statute or a construction of the constitution is involved,

* * * shall be taken directly to the Supreme Court." Here a construction of section 18 of the schedule of the constitution is involved. As we said in *County of Cook v. Industrial School for Girls*, 125 Ill. 540, on page 567: "The question of the construction of a constitutional provision usually arises out of a comparison of such provision with the terms of a statute supposed to be in conflict with it. But there are constitutional provisions which are self-executing and require no legislation to make them effectual. * * * It is clear that a question of the construction of such a self-executing clause will generally arise when it is applied to a given state of facts. If the meaning of the prohibition contained in such a clause is perfectly plain there is nothing to construe, but if there is a doubt as to the meaning of any word or phrase when applied to the proven facts then a case for construction has arisen." Said section 18 of the schedule is self-executing, and provides that all judicial proceedings shall be conducted and preserved in no other than the English language.

At first blush it would appear that there should be no occasion for a discussion as to the meaning of the words "English language." They refer to the well known spoken and written tongue used by the people of this nation. Webster's New International Dictionary defines language to be: "The body of words and methods of combining words used and understood by a considerable community." The English language is composed of words spoken or written. While these words are composed of single letters of the alphabet, the letters themselves do not constitute the English language. In fact, those letters are derived from a language more ancient than the English, and it is only by using them in connection with the spelling of English words that they can be said to be of themselves, in any sense, a part of the English language. To constitute English language the written letters used must be formed into words that are known as a part of the language, and those words

so used in such connection with one another that they form sentences which convey some thought or meaning. There are, no doubt, some abbreviations of words which have become so well known and are so commonly used that they could be said to constitute a part of the English language. But such an entry as "Fndg deft G withh prem descr in complt; judg on fndg & c." cannot be said to have been made in the English language. It is simply a jumble of words and letters and conveys no meaning whatever to an English-speaking person. The entry of this so-called order or judgment is in conflict with section 18 of the schedule of the constitution and is therefore of no effect.

We come now to a consideration of the question whether the court properly entered the *nunc pro tunc* order of June 13. A court has no right to enter a judgment *nunc pro tunc* at a subsequent term unless the judgment was, in fact, rendered at a previous term and was not entered of record through some fault, neglect or oversight. In such case, the fact that the court did give judgment at the previous term can only be proved by some memorial paper or minute in the case made at such former term. The judgments and records of courts cannot rest in parol or upon so uncertain a foundation as a personal recollection of the judge or any other person, and the fact that a judgment is rendered at a former term cannot be determined from the memory of witnesses or the personal recollection of the judge himself. Where there is no minute or memorial paper in the records of the court to show that judgment was, in fact, pronounced, it cannot be so entered. (*Coughran v. Gutcheus*, 18 Ill. 390; *Ayer v. City of Chicago*, 149 id. 262; *Chicago, Milwaukee and St. Paul Railway Co. v. Walsh*, 150 id. 607; *Tynan v. Weinhard*, 153 id. 598; *Chicago, Burlington and Quincy Railroad Co. v. Wingler*, 165 id. 634.) The order for the entry at the subsequent term recited that the entry by the clerk, as above quoted, was in

accordance with the order of the chief justice of the municipal court prescribing that entry as an appropriate and sufficient abbreviated form for the judgment which the court had directed to be entered. No evidence was heard by the court and no proof made to support the order. We have no means of knowing what was contained in the order of the chief justice referred to. That the characters entered by the clerk were in accordance with an order of the chief justice of the municipal court, and by virtue of such order represented the *nunc pro tunc* judgment entered, is merely the conclusion of the trial judge. If such an order by the chief justice existed, it should have been introduced in evidence and incorporated in the bill of exceptions in this case. It may be possible that the entry of the clerk at the time of the default could be shown to be such a memorial paper as to warrant the entry of such a judgment as is contained in the *nunc pro tunc* order of June 13, but from the facts appearing in this record it does not warrant the entry of such *nunc pro tunc* judgment. Nor can it be said that the situation is aided in the least by the recital in the order that the entry of the judgment *nunc pro tunc* was based also upon the minutes of the trial judge, which were as follows: "February 28th, 1910, D. J. P." While the letters "D. J. P." may have a well known meaning to the trial judge, or may, in fact, be designated in the order of the chief justice of the municipal court referred to as possessing a particular meaning when used in this manner, there is nothing in this record which discloses that they had any particular meaning or that it was the minute customarily made by the trial judge in such cases. So far as it appears from this record, the court was without power or authority to enter the judgment *nunc pro tunc* as of February 28, 1910.

The order of the municipal court of June 13, 1910, amending the record, is reversed and the cause is remanded

to that court, with leave to defendants in error to renew their motion for the entry of a proper judgment.

Reversed and remanded.

Mr. JUSTICE HAND, specially concurring:

I am of the opinion that there is no constitutional question raised on this record and that this court is without jurisdiction to hear and determine this case and that it should be transferred to the Appellate Court, as the only question presented for decision is the construction to be placed upon section 62 of the Municipal Court act, and the construction of a statute does not involve a constitutional question. Upon the oral argument it was conceded by counsel that the only authority for using the form in which the judgment appealed from was entered, was section 62 of the Municipal Court act and the action of the chief justice of the municipal court based thereon. That section provides that it shall be the duty of the chief justice of the municipal court to prescribe abbreviated forms in which the judgments of that court may be entered. The question, therefore, to be decided is, was the chief justice of the municipal court authorized by that section of the statute to prescribe the form in which this judgment was entered? He was authorized to prescribe abbreviated forms, and not to prescribe abbreviations in which judgments might be entered. The object of the legislature doubtless was to eliminate from the records of the municipal court the long forms in which judgments have heretofore been entered in courts of record in this State, which was commendable, and had the forms prescribed by the chief justice of the municipal court been abbreviated there could have been no objection, constitutional or otherwise, to their use, provided they were intelligible. The form used in this case was not an abbreviated one but an unintelligible jumble of abbreviations, and does not comply with the statute. As a majority of

the court are in favor of retaining jurisdiction, I agree with the view that the judgment entered is not valid.

Mr. CHIEF JUSTICE CARTER, dissenting:

I cannot concur in the conclusion reached in the foregoing opinion, and particularly in some of its statements. The questions are so important that it appears advisable to set out my views at some length. While the opinion admits that certain abbreviations of words may be used, it holds, in effect, that none of the abbreviations found in the docket entry here involved are in the English language. With this holding I cannot agree.

The provision of section 18 of the schedule of the constitution was not intended to regulate the extent to which judicial proceedings should be published or preserved. That question, in my judgment, is under the control of the General Assembly, and if that body has not acted, then it is subject to control by rules of court. It may be conceded that this provision of the constitution requires that English, and no foreign language, shall be used in preserving and publishing judicial proceedings. The form of spelling words in the English language is not within the prohibition of said section 18. A writing intended to express the English language, even though every word might be misspelled, would nevertheless not be in contravention of the constitution if a person familiar with our language could understand what was meant.

The propriety and constitutionality of the use of abbreviations in judicial proceedings in this State have always been upheld, both in the formal entry of judgments and the admission of documents in evidence. The use of abbreviations in judicial proceedings for the sale of real estate for taxes has been permitted by statute for two-thirds of a century. (Rev. Stat. 1845, p. 446; Hurd's Stat. 1909, chap. 120, sec. 184, p. 1857.) In such proceedings the abbreviations "pt." for "part," "fro" for

"from" and "ft." for "feet" have been held legal; (*Blakeley v. Bestor*, 13 Ill. 708;) also "c," "ct." or "cts." for "cents," "m" for "mills," "tx" for "tax," "vl." for "valuation" and "\$" for "dollars;" (*Jackson v. Cummings*, 15 Ill. 449;) "N. E. $\frac{1}{4}$ " for "north-east quarter;" (*Bowen v. Prout*, 52 Ill. 354; *Kile v. Town of Yellowhead*, 80 id. 208; *Law v. People*, 80 id. 268; *Paris v. Lewis*, 85 id. 597;) also "W. side" was held to mean the west side of a piece of land; (*Taylor v. Wright*, 121 Ill. 455;) also "sec. 23, 38, 14" as meaning "section 23, township 38, range 14;" (*McChesney v. City of Chicago*, 173 Ill. 75;) so also "pt. S. E. $\frac{1}{4}$ S. of T. P. & W. R. R." has been held to mean all that part of the south-east quarter of section 33 lying south of the Toledo, Peoria and Western railroad, the court saying that "the abbreviations, letters, figures and characters used in describing the lands are well understood and do not vitiate the descriptions." *Sholl Bros. v. People*, 194 Ill. 24.

Clerks of courts in this State have been required for many years to keep fee books, in which are to be "distinctly set down, in items," the cost of each suit. (Hurd's Stat. 1909, chap. 25, sec. 16, p. 514.) Under this statute this court sustained a fee bill, and took judicial notice of such abbreviations used therein as "app.," "atty.," "fil.," "doc.," "ret.," "sat.," "find.," "T. fee 50," "M. and Ec.,"—stating "the abbreviations therein appearing would be understood by the court, before whom, without a jury, the cause was tried." *Myers v. Shoneman*, 90 Ill. 80.

This court has also taken judicial notice of abbreviations used in written instruments offered in evidence. Thus, in *Belford v. Beatty*, 145 Ill. 414, it was held that "int. a 6% p. a.," in a promissory note, meant "interest at six per cent per annum;" that this must be so understood in the connection in which the abbreviations were used. In *Knapp Electrical Works v. Wire Co.* 157 Ill. 456, as also in *Consolidated Coal Co. v. Schneider*, 163 id. 393, it was

held that the initials "f. o. b." could be admitted and parol evidence heard to explain their meaning. In *State v. Intoxicating Liquors*, 73 Me. 278, judicial notice was taken of the meaning of "C. O. D." To the same effect is *United States Express Co. v. Keefer*, 59 Ind. 263. Judicial notice, likewise, has been taken of numerous other abbreviations, such as "acct.," "admr." and "supt." (*Heaton v. Ainley*, 108 Iowa, 112; *Moseley's Admr. v. Mastin*, 37 Ala. 216; *Southern Missouri Land Co. v. Jeffries*, 40 Mo. App. 360.) The letters "J. P." have been recognized as an abbreviation for "justice of the peace." (*Shattuck v. People*, 4 Scam. 477.) "N. P." are characters in common use, meaning "notary public." (*Rowley v. Berrian*, 12 Ill. 198.) In *Bowen v. Wilcox & Gibbs Co.* 86 Ill. 11, this court took judicial notice of the abbreviation "ads," holding that it meant "ad sectam" or "at the suit of," just as "v." indicated "versus" or "against." The meaning of customary abbreviations and diminutives of christian names, of other abbreviations in common use, of initials commonly employed in the community, and of initials and abbreviations of printers and surveyors, will be within the knowledge of judges and jurors. (16 Cyc. 875.) See for a long list of abbreviations of which courts have taken judicial notice, 1 Ency. of L. & P. 82, and cases cited.

An English statute provided that attorneys might write out their bill for fees and charges with such abbreviations as were then commonly used in the English language. Bills containing the following abbreviations were said to be in conformity with that law: "Drawg. declon, ffo. 15;" "Attg. you in long confce.;" "Sergt.;" "Atty.;" "Lres," etc. The court held that these abbreviations were common and intelligible to every professional man. (*Frowd v. Stillard*, 4 C. & P. 51; *Reynolds v. Caswell*, 4 Taunt. 192.) This court held in *Holbrook v. Nichol*, 36 Ill. 161, that "L. S." meant "seal." In *Metzger v. Morley*, 197 Ill. 208, "b. of e." was held, in the connection in which used, as

meaning "bill of exceptions." In Blackstone's time a death sentence was indicated on the record by the abbreviation "*sus. per col.*," as representing *suspendatur per collum*. This court has repeatedly stated that evidence could be heard to explain descriptive terms used in an ordinance in order to show that they had a well known and generally accepted meaning in the locality. *McChesney v. City of Chicago*, 226 Ill. 238; *Kuester v. City of Chicago*, 187 id. 21.

In the eleventh edition of the Encyclopedia Britannica, in the article on abbreviations, that word is defined as, "strictly, a shortening; more particularly an abbreviation is a letter or group of letters taken from a word or words and employed to represent them for the sake of brevity; abbreviations, both of single words and of phrases, having a meaning more or less fixed and recognized, are common in ancient writings and inscriptions, and very many are in use at the present time." The courts will take notice of whatever ought to be generally known within the limits of their jurisdiction. (1 Greenleaf on Evidence,—15th ed.—sec. 6; *Kile v. Town of Yellowhead*, *supra*.) We must take judicial notice as judges of what we know as men. *Ritchie & Co. v. Wayman*, 244 Ill. 509; *Munn v. Burch*, 25 id. 21.

Our authority to use letters and abbreviations to express language and writings comes not from the law, but solely from customary usage. If, then, a custom or usage is known, even locally, under the authorities, as we have seen, it is proper to prove it. The abbreviations of "Jno.," "Jas.," "Robt.," "Hon.," "Rev.," "Mr." and "Esq." are understood by everyone familiar with our language. A student of grammar would know, without explanation, that "nom." means "nominative;" "dat." means "dative;" "perf." means "perfect;" "adj." and "adv." "adjective" and "adverb," respectively. Abbreviations are often used in Biblical references and very widely understood. For in-

stance, "I Cor. I, I," means the first verse of the first chapter of the First Epistle of St. Paul to the Corinthians; "Matt." stands for that part of the Bible more accurately known as the Gospel According to St. Matthew, and "Deut." means the Book of Deuteronomy.

The fact that in order to understand the meaning of a particular abbreviation it is necessary to take into consideration the context is no reason for asserting that such abbreviation is not a legitimate expression of an English word or phrase. One of the fundamental rules of law in construing contracts or wills is that the meaning of the words should be found from the context. Thus, it has frequently been held that the word "heirs" should be construed from the context to mean "children," the word "children" to mean "heirs," or that those words and "issue" were used interchangeably. (*Stisser v. Stisser*, 235 Ill. 207; *Dick v. Ricker*, 222 id. 413; *Strawbridge v. Strawbridge*, 220 id. 61; *Butler v. Huestis*, 68 id. 594.) This court held in *Nichols v. Mitchell*, 70 Ill. 258, that it was evident from the context of a judicial record that the words "3d of March" was a clerical error, meaning "3d day of April." In *Winslow v. Cooper*, 104 Ill. 235, this court held that "north side S. W. $\frac{1}{4}$ of block 2," in a tax receipt, meant, in the connection in which used, the north half of the southwest quarter of that block. In *Lewis v. Few*, 5 Johns. 1, it was held that, in connection with the context, "understood" was "understood;" that the obvious sense, and the meaning of the sentence in which it was used, required it. In the same case the court held that "U. States" manifestly meant, as employed in an article claimed to be libelous, "United States." In *People v. Krueger*, 237 Ill. 357, this court held that the spelling of the word "knowingly" in an information as "knowly" was not reversible error. The abbreviation "Dr." by itself, alone, might mean either "doctor" or "debtor," but "Dr. John Smith" would mean

"Doctor John Smith," while "John Smith, Dr.," found in an account, would mean "John Smith, debtor."

By reason and authority the use of abbreviations in judicial proceedings is not prohibited. The question is, then, as to what extent they may be lawfully used and what particular abbreviations are or are not proper. The line is not drawn between words written out in full and all abbreviations, but it must be drawn between those abbreviations which are intelligible and those which are unintelligible. Manifestly, the sound legal rule is, that it is permissible, in judicial proceedings, to use any abbreviations which would be understood by an intelligent person who would understand the record if such words were not abbreviated. This court should not hold that abbreviations, the meaning of which are understood by judges, attorneys, officers of the court and those familiar with judicial proceedings, will be illegal because someone entirely unfamiliar with these things could not understand them. Many people, even though they can read the English language, would be entirely unable to ascertain the meaning of the records when written out in full. A system of keeping records intelligible to everybody is an impossibility. In determining what abbreviations may be used, those persons, only, should be considered who can understand the words which the abbreviations represent. This rule is followed by writers of grammars, dictionaries and other books of that character. As we have seen, the legislature provided, years ago, that in entering up a judgment for taxes abbreviations could be used, and this court has repeatedly upheld that statute. The legislature also has provided that a warranty deed would be good which contained the words "conveys and warrants," and that these words should have the meaning formerly expressed by nearly a hundred words. If the contention of plaintiff in error be correct, does it not follow that taking down the testimony of a witness in shorthand, the witness having testified in English, is not preserv-

ing it in the English language? Because we spell words phonetically,—that is, if we should spell “through” as “thru,”—does that make the writing any the less the English language?

The constitutional provision with reference to the English language applies to all proceedings in court, including depositions, affidavits, pleadings, and all other papers. If it excludes all abbreviations, the use in the bill of exceptions of “Q” to represent “Question” or “A” to represent “Answer,” or in the pleadings “Plff.” representing “plaintiff,” “Def’t.” representing “defendant” and “Atty.” representing “attorney,” would be unlawful. So it would prevent the defendant concluding his plea, “and of this he puts himself upon the country, etc.,” because those who are not familiar with court proceedings would not understand what is meant by the “etc.” There are but few decisions of this court that do not contain, both in the printed report and the copy filed with the clerk, a large number of abbreviations used in citing authorities and references to statutes. Such abbreviations are likewise found in the reports of all the other States and England. It has never been suggested that because of these abbreviations these opinions were not in the English language.

Power to prescribe rules and practice is not exclusively a legislative one,—the legislature may confer it upon the courts. In *Wayman v. Southard*, 10 Wheat. 1, Chief Justice Marshall said (p. 42): “It will not be contended that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative, but Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself. * * *

The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made and the power given to those who are to act under such general provisions to fill

up the details, * * * but the maker of the law may commit something to the discretion of the other departments." In *Coleman v. Newby*, 7 Kan. 82, it was stated that the legislature may enact general provisions authorizing the courts who are to act thereunder to fill up the details. It may mark the outlines and leave those who are to act within those outlines to use their discretion in carrying out the minor regulations. See to the same effect, *Hopkins v. Levandowski*, 250 Ill. 372.

Congress has always granted to the Federal courts large power as to making their rules of practice, forms and modes of proceeding. Every court of record has inherent power, irrespective of statute, to make rules, not in conflict with statutory or constitutional regulations, for the transaction and regulation of its business. (8 Am. & Eng. Ency. of Law, 29, and cases cited.) It would be practically impossible for the legislature "to regulate the details and minutiae of the practice in our courts." (*Hinckley v. Dean*, 104 Ill. 630.) In this case it was also held that the provision of section 29 of article 6 of the constitution, as to proceedings and practice of all courts of the same class or grade being uniform, refers "alone to legislation and not mere rules of court regulating practice." The power possessed by the courts to make rules regulating practice has been repeatedly upheld in this State. *Scammon v. McKee*, 21 Ill. 554; *Holloway v. Freeman*, 22 id. 197; *Howe v. Thayer*, 24 id. 246; *Hayward v. Ramsey*, 74 id. 372; *Rozier v. Williams*, 92 id. 187; *Gage v. Eddy*, 167 id. 102; *Dahnke v. People*, 168 id. 102; *In re Day*, 181 id. 73; 8 Am. & Eng. Ency. of Law, (2d ed.) 28.

The keeping of the records of a court is a matter of practice. In *Fleischman v. Walker*, 91 Ill. 318, the court said: "The mode and order of procedure in obtaining compensation for an injury by action or suit in the legally established courts, from the inception of such suit until it ends in a final determination of the court of last resort, is

all comprehended in the term 'practice.' The relative jurisdictions of the several courts; the modes by which and the extent to which controversies may be transferred, for trial or for review, from one tribunal to another, and, where several transfers are allowed, the order of sequence in such transfers, are all included in what is called the practice of the courts. The word 'practice' is so understood and treated by the text writers, and it is defined by Bouvier to be the 'form, manner and order of conducting and carrying on suits or prosecutions in the courts through their various stages, according to the principles of law and the rules laid down by the respective courts.' "

The amendment to the constitution under which the municipal court was established provided that "the jurisdiction and practice of said municipal courts shall be such as the General Assembly shall prescribe." In discussing whether oral instructions could be given in the municipal court, this court held, in *Morton v. Pusey*, 237 Ill. 26, that this constitutional provision would be meaningless if so construed as to hold that the practice as to giving instructions in the municipal court must be the same as in other courts; that as the question of oral or written instructions was solely a matter of practice, section 34 of the Municipal Court act, permitting either method, was constitutional; that "one purpose of the legislature and of the people unquestionably was to authorize the creation of a code of practice for the municipal court of Chicago which might apply to that court alone."

In *Lassers v. North-German Steamship Co.* 244 Ill. 570, in discussing a question of practice as to the right to a bill of exceptions because such right exists in other courts of the same grade, we said: "Those provisions, however, which affect only the record, jurisdiction, proceedings and practice of the municipal court are valid, since, by virtue of section 34 of article 4 of the constitution, section 29 of article 6 does not restrict the legislature

in prescribing the jurisdiction and practice of such municipal court." That the courts can make rules regulating practice has been held in many other States. *Gannon v. Fritz*, 79 Pa. 303; *Baker v. Blood*, 128 Mass. 543; *Baker v. State*, 84 Wis. 584; *Hughes v. Jackson*, 12 Md. 450; *Detroit, G. R., W. R. R. Co. v. Eaton*, 128 Mich. 495; *State v. Edwards*, 110 N. C. 511; *Texas Land Co. v. Williams*, 48 Tex. 602.

Section 22 of the Municipal Court act provides that no assignment of error in either the Appellate or Supreme Court in any case shall be allowed which shall call in question the decision of the municipal court in respect to any matter pertaining to the practice in said court. Beyond question, under the authorities, the keeping of records in the municipal court pertains to the practice of that court. In declaring by this provision that in matters of practice in the municipal court the decision of that court should be final the General Assembly exercised the power given it by the constitutional amendment of 1904. This enactment is valid, even though statutes regulating the jurisdiction and practice of other courts of this State allow the decisions of those courts on matters of practice to be reviewed by the Supreme and Appellate Courts. It has been repeatedly held that, where not in contravention of constitutional provisions, the legislature may provide that the decision of the *nisi prius* courts shall be final and conclusive. For example, originally the law regulating the jurisdiction of *nisi prius* courts made the judgments of that court in cases tried by jury final as to the facts. Subsequently this finality was taken away by statute and given to appellate tribunals. As to certain classes of cases the decision of the Appellate Court is final as to the facts, and the Supreme Court cannot disturb such finding of that court. The legislature could, if it saw fit, change the law and make the judgments of the trial court conclusive as to all matters of fact. This it can do as to cases tried in the municipal

court as well as in the circuit courts of the State. In Massachusetts it has been decided that a brief docket entry, while not technically a judgment record, would be held good when it contained all the material parts which would comprise the record and would be entitled to the same credit as a record written out at large. (*Pruden v. Alden*, 40 Mass. 184; *Davidson v. Slocumb*, 35 id. 464; *Read v. Sutton*, 56 id. 115.) In Maryland it was decided that abbreviated docket entries should be held of as high a grade as the record when written out, because they had been so held for many years. (*Boteler v. State*, 8 G. & J. 359.) The Federal courts in the District of Columbia held the same in *W., A. & G. Steam Packet Co. v. Sickles*, 24 How. 333. In Pennsylvania the method of keeping judicial records is on the docket. (*Ruggles v. Alexander*, 2 Rawle, 231.) A docket entry which contained all the essential entries of a judgment was held sufficient to support an appeal although the entry was informal. *Kuhlman v. Wieben*, 2 L. R. A. (N. S.) 666, and cases cited in note.

At common law a judgment was defined as the sentence of the law pronounced by the court upon the matter contained in the record. (3 Blackstone's Com. 395.) Freeman, in his work on Judgments, after mentioning the fact that the authorities were not all in harmony, says: "I think that from the cases this general statement may be safely made: That whatever appears upon its face to be intended as the entry of a judgment will be regarded as sufficiently formal if it shows (1) the relief granted, and (2) that the grant was made by the court in whose records the entry is written. In specifying the relief granted, the parties against and to whom it is given must, of course, be sufficiently identified." (1 Freeman on Judgments,—4th ed.—sec. 50.) This court has said that no particular form is required in proceedings in court in order to constitute a judgment. (*Wells v. Hogan*, Breese, 337; *Foster v. Jared*, 12 Ill. 451; *Minkhart v. Hankler*, 19 id. 47.)

In the cases of *Faulk v. Kellums*, 54 Ill. 188, and *City of Alton v. Heidrick*, 248 id. 76, we held that the judgment entries were wrong, not because they were not in the English language, but because the law as existing did not authorize those forms to be treated as judgments.

I see no reason why the legislature cannot provide that the words "judgment for plaintiff for \$100 and costs," shall mean the same thing as if written out in the customary form of judgment that has been used ever since courts were established in Illinois. If it can thus provide, it could also provide that abbreviations could be used, such as "Judgt." for "judgment" and "Plff." for "plaintiff," without contravening section 18 of the schedule of the constitution of 1870. If that be so, then it must follow that short or abbreviated forms of judgments, not inconsistent with statutory rules or the constitution, when the meaning is clearly shown by the context, can be authorized by rules of court. In England, in practice, the proceedings are seldom entered on the judgment roll unless it is absolutely necessary to do so in order to bring error, for the purpose of evidence, or the like. (Smith's Actions at Law,—11th ed.—1873, p. 192.) Section 62 of the Municipal Court act, as to amplifying proceedings, is similar to and doubtless based on this old English practice.

Under the reasoning of the authorities the practice of using abbreviations must apply in the same way to writing judgments as to other writings forming part of the record or proceedings of a case.

The opinion says: "Such an entry as 'Fndg deft G withh prem descr in complt; judg on fndg & c.' cannot be said to have been made in the English language. It is simply a jumble of words and letters and conveys no meaning whatever to an English-speaking person." Conceding for the sake of the argument that some of these abbreviations, standing alone, are subject to criticism as not being fairly intelligible, it can hardly be fairly said that judges,

attorneys and officers of courts and those familiar with judicial proceedings would not easily understand these abbreviations in the connection in which they are used. Courts always seek the meaning of words or abbreviations from their context. This is not only the common sense view but has always been the law.

An inspection of this record shows that this was an action of forcible entry and detainer, hence a lawyer, judge or anyone familiar with court proceedings would expect words to be used which would be appropriate to that action. The words that could properly be used in writing up a judgment in that action are comparatively few and are familiar to every judge and practicing lawyer. The abbreviation "fndg.," it can readily be seen, could be the abbreviation of not more than four or five words, and the only one that could properly be used would be "finding," as none of the other words for which this could be an abbreviation are used in writing out a forcible entry and detainer judgment. The abbreviation "deft." has always been used by the members of the legal profession, clerks of courts and others who are familiar with court matters, as meaning "defendant." No one would take it to mean anything else. The abbreviation "G" might be fairly subject to criticism, but there are only two findings or verdicts in a forcible entry and detainer action,—"guilty" and "not guilty." Does it not necessarily follow that to every judge and lawyer the abbreviations "fndg deft G," when part of such a judgment, mean "finding defendant guilty?" What could the abbreviations "withh prem descri in complt" mean in this entry to one familiar with this action except "withholding premises described in complaint?" A defendant in a forcible entry and detainer suit cannot properly be found guilty of anything except of withholding premises described in the complaint. The abbreviations "judg on fndg" can not reasonably mean anything else except "judgment on

finding." The abbreviation "judg." has been recognized by this court in *Myers v. Shoneman*, *supra*. The two abbreviations of "fndg." in this abbreviated judgment entry from the context corroborate the conclusion that they mean "finding." While possibly "G" for "guilty" and "withh" for "withholding" are subject to criticism, I can reach no other conclusion than that from the connection in which they are used they would be understood by all lawyers, judges, clerks of courts and others acquainted with judicial proceedings.

Furthermore, if these abbreviations are not in conformity with law or proper rules of practice, still, in my opinion, plaintiff in error should not be permitted to take advantage of that fact in this proceeding. The rendition of the judgment is a judicial act and the entry is a ministerial act. Though the judgment be not entered at all, it is still none the less a judgment. (1 Black on Judgments, sec. 106.) That which the court performs or orders to be performed judicially is not to be avoided by the action or want of action of the judges or other officers in their ministerial capacity. It is therefore not indispensable to the validity of an execution, and a sale made thereunder, that the judgment should have been actually entered before the writ issues. (1 Freeman on Judgments,—4th ed.—sec. 38.) Our statute as to clerks of courts recognizes the validity of the judgment before it is entered by the clerk. Section 14 of chapter 25 (Hurd's Stat. 1909, p. 513,) provides that clerks "shall enter of record all judgments, decrees and orders of their respective courts, before the final adjournment of the respective terms thereof, or as soon thereafter as practicable." An execution is not void because it is issued and delivered to the sheriff before the judgment is actually entered upon the records of the court. (*Weigley v. Matson*, 125 Ill. 64.) It is a common practice for clerks of courts to make and certify a transcript, if requested, with-

out waiting for the formal entry of the judgment or decree upon the record. The entry of a judgment *nunc pro tunc* is always proper when a judgment has been rendered but the clerk has failed or neglected to copy it into the record. The only qualification of this rule is that there be something appearing on the record upon which to base the order; that it cannot be done upon parol testimony or upon the mere memory of the clerk. *Metzger v. Morley*, *supra*; Freeman on Judgments, sec. 61.

It has always been held that the minutes of a judge or clerk, though not properly a part of the records, are sufficient to authorize the entry of a judgment at a subsequent term. As has been seen, this court has frequently held that it will take judicial notice of the meaning of various abbreviations, and that as to other abbreviations parol testimony is admitted to explain their meaning. (See, also, *McChesney v. City of Chicago*, 173 Ill. 75; 1 Am. & Eng. Ency. of Law,—2d ed.—99.) It is well known that the minutes kept by the judges and clerks are generally kept wholly or in part in abbreviated words.

This court has consistently held that the minutes or notes of judges or clerks, even though in abbreviated words, can be used to correct a record at a subsequent term and the order entered *nunc pro tunc*. Under the rulings of this court in *Forquer v. Forquer*, 19 Ill. 68, *McCormick v. Wheeler, Mellick & Co.* 36 id. 114, *People v. Quick*, 92 id. 580, *Metzger v. Morley*, *supra*, and many other cases, it seems to me that the abbreviated docket entry above set out would be readily understood by judges, lawyers and others familiar with legal proceedings, and would, therefore, be amply sufficient to authorize an order or judgment to be entered *nunc pro tunc* at a subsequent term as of the date when said abbreviated entry was made. The transcript before the court states that the abbreviated docket entry was expanded by the order of court. The court hav-

ing examined the minutes as entered by the clerk, and his own minutes, ordered the entry of this judgment *nunc pro tunc*. No fault is found with the form of the *nunc pro tunc* judgment.

On reason and authority, therefore, the ruling of the trial court on the motion to amend the record was, in my judgment, proper, and should not be permitted to be questioned on this record.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, vs.
WILLIAM BYRD *et al.* Appellants.

Opinion filed December 21, 1911—Rehearing denied Feb. 17, 1912.

1. WILLS—as to personal property a will is construed according to the laws of the testator's domicile. As to personal property the will of a non-resident is to be construed according to the laws of the State where he resides.

2. SAME—rule that the testator's expressed intention should be given effect is in force in New York and Illinois. The rule that the testator's intention as expressed by him should be given effect, unless to do so would violate some established principle of law or rule of public policy, is in force both in New York and Illinois.

3. SAME—when a remainder is contingent. A clause of a will giving the residue of the testator's property to his wife for life, "and upon her death to my children, [naming them,] share and share alike; and if either of said children [naming them] die leaving issue, either before me or before my said wife, then the issue of the child so dying shall take the share which his, her or their parent would have taken if living at her death," creates a contingent remainder in such children.

4. INHERITANCE TAX—the court should take the highest amount which in any contingency may become liable. In determining the amount of inheritance tax due under the Inheritance Tax law the court should take the highest amount which in any contingency would become liable to the tax; and if it is possible that upon the happening of the event which will vest a contingent remainder the entire remainder may go to one person, the court should compute the tax upon the entire remainder, less the statutory deduction the one remainder-man would be entitled to.

APPEAL from the County Court of Cook county; the Hon. JOHN E. OWENS, Judge, presiding.

ALBERT M. KALES, for appellants:

Under the fourth clause of the will the children named take absolute vested interests, not subject to any contingency that they must survive the life tenant, but subject only to be divested in the one event that they die leaving issue. Gray's Rule Against Perpetuities, (2d ed.) secs. 101, 102, 108; *Ducker v. Burnham*, 146 Ill. 9; *Hinrichsen v. Hinrichsen*, 172 id. 462; *Pingrey v. Rulon*, 246 id. 109; *McConnell v. Stewart*, 169 id. 374; *Haward v. Peavey*, 128 id. 430.

The fact that the gift to the children is introduced by the words "upon the death," referring to the death of the life tenant, cannot make the gift to the children contingent upon surviving the life tenant. Gray's Rule Against Perpetuities, (2d ed.) 77, note 2; *Cheney v. Teese*, 108 Ill. 473; *O'Melia v. Mullarky*, 124 id. 506; *Ducker v. Burnham*, 146 id. 9; *McConnell v. Stewart*, 169 id. 374; *Bowler v. Bowler*, 176 id. 541; *Knight v. Pottgieser*, 176 id. 368; *Doe v. Considine*, 73 U. S. 458; *Mining Co. v. Batdorff*, 5 Pa. St. 503; *Doe v. Provoost*, 4 Johns. 61; *Livingston v. Greene*, 52 N. Y. 118; *Byrnes v. Stilwell*, 103 id. 454.

The same rule is admitted in *Bates v. Gillett*, 132 Ill. 287. The result there goes upon a special context which is utterly inapplicable in the case at bar.

The construction of this will is governed by the law of the State of New York. 22 Am. & Eng. Ency. of Law. (2d ed.) 1366.

Under the New York law, as appears from the evidence, the construction contended for must be given. *Connelly v. O'Brien*, 166 N. Y. 406; *Byrnes v. Stilwell*, 103 id. 454; *Livingston v. Greene*, 52 id. 118.

W. H. STEAD, Attorney General, and WALTER K. LINCOLN, (J. SCOTT MATTHEWS, of counsel,) for the People:

The will should be construed as a whole. The intention of the testator is plainly apparent that the vesting of any estate in either a child or grandchild of the testator should be dependent upon their living at the date of the death of the testator's wife. *Robinson v. Martin*, 200 N. Y. 159; *Bisson v. Railroad Co.* 143 id. 125; *Ranhofer v. Realty Co.* 143 App. Div. (N. Y.) 237; *Bates v. Gillett*, 132 Ill. 287; *Matter of Wyatt*, 9 Misc. (N. Y.) 285; *Matter of Ryder*, 11 Paige's Ch. 185.

The gift to children or issue of deceased children was a gift to a class, and the survivor or survivors of that class at the date of death of the testator's wife will alone be entitled to share in the distribution of the estate. *Roosevelt v. Porter*, 73 N. Y. Supp. 800; *Hoppock v. Ticker*, 59 N. Y. 202; *Page v. Gilbert*, 32 Hun, 301; *Pardue v. Givens*, 54 N. C. 306; *Chase v. Peckham*, 17 R. I. 385; *In re Warren's Appeal*, 39 Conn. 253; *Swallow v. Swallow*, 166 Mass. 241; *Talcott v. Talcott*, 39 Conn. 186.

This case comes within the clear meaning of section 25 of the Inheritance Tax act of Illinois, and a tax should be levied at the highest possible rate. *Matter of Vanderbilt*, 172 N. Y. 69; *Matter of Brez*, 172 id. 609.

Mr. JUSTICE VICKERS delivered the opinion of the court:

George H. Byrd, a resident of New York, died testate leaving \$74,071.54 of personal property subject to the Inheritance Tax law of this State. The present appeal is prosecuted by the executors of the last will of the testator from an order of the county court finding that \$15,590.68 of said estate was liable to an inheritance tax of \$155.91. The State, by the Attorney General, has assigned cross-errors which raise the question whether the court did not err in refusing to hold that the amount of the inheritance

*tax should be \$355.91 instead of the amount fixed by the court.

The questions at issue arise out of the following facts: The fourth clause of the testator's will is as follows:

"Fourth—If my wife, Lucy Carter Byrd, survives me, I give, devise and bequeath all the rest, residue and remainder of my estate, real and personal and wheresoever situated, unto her during her life, and upon her death to my children, Anne Harrison Byrd, Lucy Carter Byrd, William Byrd and Francis Otway Byrd, share and share alike; and if either of my said children, Anne, Lucy, William or Francis, die leaving issue, either before me or before my said wife, then the issue of the child so dying shall take the share which his, her or their parent would have taken if living at her death."

It is admitted that the sum of \$74,071.54 of the testator's personal estate was disposed of under the foregoing clause of his will. The widow's life estate was appraised at \$18,480.86, which, under the statute, was exempt from any inheritance tax. Deducting the value of the widow's life estate from the total leaves \$55,590.68, which passes as a remainder under the fourth clause of the will above quoted. Appellants contend that the residue passed as a vested remainder to the four children named by the testator, share and share alike, and that since each share, when thus divided, is less than \$20,000, there is nothing left subject to an inheritance tax. Appellee contends that it was the intention of the testator to keep his estate intact until the death of his widow, and that at that time it should vest in such of the children named as might survive the widow, and the issue, if any, of such of the children named as might die before the widow. In other words, the People contend that the remainder was devised to the children who might survive the widow as one class and to the issue of such as might predecease her as another class, and that such

remainder was therefore contingent. If appellants' contention be sustained, it follows that the court erred in holding that any part of said estate was subject to an inheritance tax. If appellee's contention be sustained, then it is conceded that some amount of inheritance tax is due.

The principal controversy between the parties relates to the construction to be given to the fourth clause of the testator's will. The testator being a resident of the State of New York, his will, so far as it affects personal property, is to be construed by the law of New York. Upon this question both parties agree. The only rule of law relating to construction of wills that it will be necessary to refer to is that general and well established rule that in construing a will the intention of the testator as expressed by him should be given effect, unless to do so would violate some established principle of law or rule of public policy. This rule is the same in New York as it is in Illinois. (*Weeks v. Cornwell*, 104 N. Y. 325; *Robinson v. Martin*, 200 id. 159.) In the case last above cited the Supreme Court of New York said: "Precedents and rules frequently have but slight value in interpreting wills, for those instruments are rarely, and in the nature of things are not likely to be, similar in terms. When the testator's intention is obscure, resort to them may be helpful in ascertaining it. Where, upon inspection of the will and upon a consideration of relevant facts and circumstances, an intent is apparent, all rules to the contrary must yield, provided that intent does not offend against public policy or some positive rule of law. It may well be said that some of the rules of construction require a greater force of intention to control them, but if it be found in the instrument it should be allowed."

Appellants rely on the cases of *Byrnes v. Stilwell*, 103 N. Y. 454, and *Livingston v. Greene*, 52 id. 118, as laying down the rule that should govern in the case at bar. In those cases the language of the wills under consideration,

when taken in connection with the context, leads to the conclusions reached in these particular cases, but nothing is there said which indicates that the general rule that the intention of the testator is to control is not the polar star in construing wills in that State, as it is here.

Guided by this general rule we think that the intention of the testator is so clearly expressed in the fourth clause of his will that it is possible to understand it without resorting to technical rules of construction. The first sentence in clause 4 clearly gives the testator's wife a life estate in all of the remainder of the estate, both real and personal, wherever situated. After devising the life estate to his wife the testator proceeds as follows: "*and upon her death* to my children, [naming them,] share and share alike." If the clause had ended here there would be much force in appellants' contention that the remainder was vested, and that the words "upon her death" merely refer to the time when the devisees named were to come into the enjoyment of the estate; but we think that the intention to postpone the vesting as well as the enjoyment of the estate is clearly made to appear by what follows in said clause. The clause in question contains the following additional language: "and if either of my said children, Anne, Lucy, William or Francis, die leaving issue, either before me or before my said wife, then the issue of the child so dying shall take the share which his, her or their parent would have taken *if living at her death.*" The words "if living at her death" clearly indicate that a child must be living at her death,—that is, the death of the widow,—in order to take under the will. If, as appellants contend, the estate vested in the children at the death of the testator, manifestly they would not take at the death of the widow. If the testator intended that each of his children should take a vested interest at the time of his death and wanted to provide for the children of any that might die before the estate vested, he would naturally and reasonably have used the words "which his, her or their

parent would have taken if living at *my* death," but he uses the words "if living at *her* death," referring to the death of his wife. This conclusion seems more reasonable when the fifth clause of the will is read. The fifth clause is as follows:

"Fifth—If my said wife does not survive me, I give, devise and bequeath all the rest, residue and remainder of my estate, real and personal and wheresoever situated, to my children, Anne Harrison Byrd, Lucy Carter Byrd, William Byrd and Francis Otway Byrd, share and share alike. If either of my said children, Anne, Lucy, William or Francis, should die before me leaving issue, then the issue of the child so dying shall take the share which his, her or their parent would have taken if living at my death."

Had the widow not survived the testator the property in question would have passed, upon the testator's death, under the fifth clause. There the intention to vest the property at the time of the testator's death in the event the wife did not survive him is made very clear. Reading these two clauses together, we are forced to the conclusion that the testator used the words in the fourth clause, "if living at *her* death," advisedly, and that he thereby clearly intended that the estate should not vest in the remainder-men until the death of his widow. In our opinion the remainder to the children was contingent.

The court did not err in holding that there was a liability here under the Inheritance Tax act but it did err in fixing the amount of said tax. In determining the amount of inheritance tax under the Inheritance Tax law the court should take the highest amount that in any contingency would become liable to the tax. A possible contingency here is that three of the four devisees named may die before the widow, leaving no issue. In that contingency the one survivor would receive all of the estate, for the reason such one would be the only representative of the class living at the time the estate vests. The court below did not

adopt this rule, but supposed the possible contingency that two of the children named should die without issue before the widow, leaving two survivors of the class to take the estate. The court then divided the devise equally between the two supposed survivors and deducted \$20,000 from each share to arrive at the amount of tax due. Under the rule requiring the court to adopt the highest amount that in any contingency can pass, the amount here was subject to only one deduction of \$20,000. No case involving the construction of the Inheritance Tax law in this regard has heretofore come before this court, but our statute in this respect is identical with the statute of New York. Section 25 of the New York statute has been construed by the Court of Appeals of New York in accordance with the views herein expressed. *In the matter of Vanderbilt*, 172 N. Y. 69; *In the matter of Brez*, 172 id. 609.

The judgment of the county court of Cook county is reversed on the cross-errors and the cause remanded to that court, with directions to enter judgment for \$355.91, which is the correct amount of inheritance tax due.

Reversed and remanded, with directions.

WILLIAM O. LAMONTE, Petitioner, vs. WILLIAM KENT
et al. Respondents.

Decision announced orally February 14, 1912.

1. PRACTICE—source of power of the Supreme Court to review judgments of Appellate Court by writ of certiorari. The power of the Supreme Court to issue a writ of certiorari to bring before it for review a judgment of the Appellate Court is derived from section 121 of the Practice act of 1909. (Laws of 1909, p. 304.)

2. SAME—rule as to granting certificates of importance. Under the Practice act, as amended in 1909, the Appellate Court may grant a certificate of importance in any case, whether the judgment be for more or less than \$1000, exclusive of costs.

3. SAME—the judgment must be for more than \$1000 to be reviewable by *certiorari*. The Supreme Court cannot issue a writ of *certiorari* to review a judgment of the Appellate Court affirming a judgment in an action *ex contractu* or sounding in damages unless the judgment, exclusive of costs, exceeds \$1000; and this is true notwithstanding the amount claimed by the pleadings exceeds \$1000 and there was no trial of an issue of fact in the trial court.

4. SAME—section 121 of the Practice act repeals portion of section 8 of the Appellate Court act. Section 121 of the Practice act, as amended in 1909, repeals that portion of section 8 of the Appellate Court act providing that in all actions where there was no trial of an issue of fact in the lower court appeals and writs of error shall lie from the Appellate Court to the Supreme Court if the amount claimed in the pleadings exceeds \$1000.

5. SAME—how a judgment for costs may be reviewed. Under section 121 of the Practice act the only way in which a judgment for costs in an action *ex contractu* or sounding in damages, which has been affirmed by the Appellate Court, can be reviewed is upon a certificate of importance.

PETITION for writ of *certiorari*.

EDWARD H. MORRIS, for petitioner.

HARLAN & McCANDLESS, for respondents.

Mr. JUSTICE COOKE announced the decision of the court:

The petitioner, William O. LaMonte, brought this action on the case for libel in the circuit court of Cook county against William Kent and Henry S. Fitch, claiming by his declaration \$50,000 damages. To the declaration the respondents interposed six pleas, the first of which was the general issue and the third a plea of justification. On these two pleas issues were joined. To the other four pleas, and to the plea of the Statute of Limitations, which was interposed on behalf of respondent Kent, demurrers were sustained and defendants were given leave to amend three of the joint pleas. Under this leave two amended pleas were filed, to which demurrers were overruled. The petitioner

elected to stand by his demurrers, and it was ordered that the respondents go hence without day and judgment was entered against petitioner for costs. This judgment was affirmed by Branch "B" of the Appellate Court for the First District upon writ of error, and petitioner now seeks to have the record of the Appellate Court brought here for further review by writ of *certiorari*.

The power of this court to issue a writ of *certiorari* to bring before it for review a judgment of the Appellate Court is derived from section 121 of the Practice act, as amended and in force July 1, 1909. That section provides that the judgment of the Appellate Court shall be final in all cases except those wherein appeals and writs of error are specifically required by the constitution to be allowed to this court, and in two other classes of cases. The first of these two other classes are cases in which the Appellate Court shall grant certificates of importance, and the second, those which this court may require to be certified for its review and determination by *certiorari*, provided that in actions *ex contractu*, (exclusive of actions involving a penalty,) and in all actions sounding in damages, the judgment, exclusive of costs, shall be more than \$1000. The Appellate Court may grant a certificate of importance in any case, whether the judgment be for more or less than \$1000, but in actions *ex contractu* or actions sounding in damages where the judgment is for \$1000 or less, no judgment of the Appellate Court can be reviewed in this court without a certificate of importance. In cases where the judgment is in excess of \$1000 review may be had either upon certificate of importance or by writ of *certiorari*. The judgment in this case is against the plaintiff for costs, only, and therefore does not come within the terms of the *Certiorari* act.

Prior to the adoption of said amendment of 1909 to the Practice act the case at bar would have been removable

from the Appellate Court to this court by appeal or writ of error as a matter of right, under that portion of section 8 of the Appellate Court act which provides "that in all actions where there was no trial on an issue of fact in the lower court, appeals and writs of error shall lie from the Appellate Courts to the Supreme Court where the amount claimed in the pleadings exceeds one thousand dollars (\$1000)." This provision of section 8 of the Appellate Court act has been repealed by said amended section 121 of the Practice act, which, as stated, provides that the judgments of the Appellate Court shall be final in all cases except those particularly enumerated. A case such as this, where the amount claimed in the pleadings exceeds \$1000, and where there has been no trial of any issue of fact in the trial court, is not among the cases enumerated in section 121 of the Practice act as exceptions to the provision that the judgments of the Appellate Court shall be final in all cases. Under the present statute a judgment in an action *ex contractu*, or in an action sounding in damages which does not exceed \$1000, may only be brought from the Appellate Court to this court for review where the Appellate Court shall grant a certificate of importance. We have no power or authority to bring up for review, by *certiorari*, a judgment of the Appellate Court in an action *ex contractu* or sounding in damages which, exclusive of costs, does not exceed \$1000; and this is true whether or not there has been a trial of any issue of fact in the lower court.

The petition for a writ of *certiorari* will therefore be denied.

Writ denied.

THE PEOPLE *ex rel.* Paul W. Abt, County Collector, Appellee, *vs.* FRANK B. BOWMAN, Appellant.

Opinion filed December 21, 1911.

1. TAXES—the board of election commissioners have power to draw warrants on county treasury in certain cases. An item of county tax “for warrants of the board of election commissioners” is a proper item where there is a city in the county having such a board, as sections 4, 5 and 6 of article 7 of the City Elections law provide for the payment of the expenses of general county and State elections in such city, and require the election commissioners to audit the claims therefor and draw warrants on the county treasury.

2. SAME—when all expenses of elections need not be included in one item of county tax. Where there is a city in the county which has adopted the City Elections law it is not improper for the county tax levy to specify an item for “election expenses” and another item “for warrants of the board of election commissioners,” since the expenses of general county and State elections held in the city are paid on warrants drawn by the election commissioners, whereas the election expenses for the county outside of the city are audited and paid by the board of supervisors.

3. SAME—item “for warrants of board of election commissioners” applies only to election expenses. An item in a county tax levy “for warrants of the board of election commissioners” can apply only to the expenses of general county and State elections held in the city, as the salaries of the clerk and members of the board are paid by the county on the warrant of the county judge, and the expenses of the board, other than salaries, are paid by the city on the warrant of the county judge.

4. SAME—when a levy for “salary, clerk hire and expenses of county treasurer” is proper. An item of a county tax levy “for salary, clerk hire and expenses of the county treasurer” is not improper in a county where the county treasurer is *ex officio* supervisor of special assessments at a fixed compensation, even though the treasurer’s salary must be paid from the fees of his office; nor is such item illegal because it groups “salary, clerk hire and expenses” and levies a gross sum for those purposes.

5. SAME—what items of a county tax levy are not sufficiently definite. Items in a county tax levy “for county farm, \$25,000,” “for county jail, \$15,000,” “for workhouse, \$1200,” and “for court house, \$35,000,” are not sufficiently definite to satisfy the statute, since they do not disclose whether the money is needed to buy

grounds and buildings, or to improve buildings, or for the general running expenses of the several institutions; items for "salaries of county appointees" and "for other salaries" are also too general.

6. SAME—a county levy "for State institutions" is not illegal. An item of a county tax levy "for State institutions" is not illegal upon the alleged ground that there is no law making the county liable to contribute to the support of State institutions, where it is manifest the item was intended for the support and maintenance of insane paupers of the county in the State hospitals for insane.

7. SAME—item of county levy "for assessments" is too general. An item of a county tax levy "for assessments" cannot be sustained as having been intended to cover the necessary expense of revising assessments of the county, where there is nothing in the levy to indicate that the item was for that purpose.

8. SAME—item of county levy "for fees of county officers" may be sustained. An item of a county tax levy "for fees of county officers," when taken in connection with the statute providing for fees which must, in the first instance, be paid by the county to certain county officers and applied by the latter to the payment of their salaries, is sufficiently definite to give the tax-payer information as to the purpose of the levy.

9. SAME—when an item of county levy for "bridges" is proper. An item of a county tax levy for "bridges," which is intended for the purpose of raising a fund to meet such calls for county aid to townships as may be made under proper petitions, must be sustained, where the only objection is that the term "bridges" is not sufficiently definite, as that term fairly includes the building of new bridges, the repair of old ones and the building of approaches or abutments. (*People v. Chicago and Northwestern Railway Co.* 249 Ill. 170, distinguished.)

10. SAME—when item "for sundry and general expenses" will be sustained. An item of a county tax levy of \$1000 "for sundry and general expenses, the exact nature of which cannot be ascertained in advance," will be sustained where the county making the levy is a large and populous county, as the validity of such a levy depends upon the amount levied, considered in connection with the size of the levying municipality.

11. SAME—an item of county levy "for stenographer's fees," is not improper. An item of a county tax levy of \$150 "for stenographer's fees" is not improper.

12. SAME—when an appropriation ordinance is not invalid as amending a void ordinance. Where a second appropriation ordinance, which is complete in itself, is published in the manner and within the time required by law, it is valid notwithstanding it

states in its title that it is an ordinance to amend a former appropriation ordinance which for want of publication had not become effective, as such statement may be rejected as surplusage.

13. SAME—*statute fixing the time for passing an appropriation ordinance does not include sanitary districts.* Paragraph 89 of the Cities and Villages act, (which is section 2 of article 7 of said act,) requiring the appropriation ordinance to be passed in the first quarter of each fiscal year, refers only to cities and villages, and does not include other municipal corporations, such as sanitary districts, which have power to levy taxes.

14. SAME—*section 121 of the Revenue act, concerning county taxes, does not apply to sanitary districts.* Section 121 of the Revenue act, requiring the county board, annually, at its September session, to determine the amount of taxes to be raised for county purposes and requiring the several purposes to be stated separately, has no application to a sanitary district.

15. SAME—*time when a tax levy ordinance of sanitary district must be passed.* Section 17 of the Sanitary District act, which is the only limitation in regard to the levying of taxes by such districts, requires the taxes to be levied by an ordinance specifying the purposes of the levy and requires a certified copy to be filed with the county clerk before the second Tuesday in August, hence there is no requirement as to when the ordinance shall be passed, if passed in time to permit the copy to be filed as required.

16. SAME—*fact that bonds are payable in one year does not justify treating tax to pay them as a levy for current expenses.* The fact that bonds to pay which a tax is levied by a sanitary district are payable in one year does not justify treating the tax as a tax for current expenses and subjecting it to a reduction under the amended Revenue law, as there is nothing to prevent a municipal corporation, acting in good faith, from borrowing money for one year and issuing bonds therefor, there being no question of exceeding the constitutional limit of indebtedness involved.

17. SAME—*court cannot change tax levy from one purpose to another.* The fact that a tax levy by a sanitary district to pay bonded indebtedness and interest may be illegal, as being a mere shift or device to prevent a reduction under the amended Revenue law, would not authorize the court to change the levy as made by the ordinance to a levy for current expenses or any other purpose.

18. SAME—*what action by sanitary district trustees is not subject to review.* If the board of trustees of a sanitary district, acting in good faith, deem it more advisable to borrow money for one year and issue bonds therefor than to issue tax-anticipation warrants or contract for work, to be paid for as the taxes are col-

lected, the exercise of their judgment in that regard is not subject to review by the courts, provided their action is not unlawful.

19. COUNTIES—*compensation of treasurer as supervisor of assessments is an earning of the office.* The amount fixed by section 2 of the act of 1898 as compensation to the county treasurer for his work as supervisor of assessments is an earning of the office, the same as any other fees and commissions, and when paid by the county must be applied, like other earnings, to the payment of the salary fixed by the county board for the office of county treasurer.

APPEAL from the County Court of St. Clair county;
the Hon. JOHN B. HAY, Judge, presiding.

J. M. FREELS, and TURNER & HOLDER, for appellant.

F. J. TECKLENBERG, State's Attorney, (DAN MCGLYNN, and JOHN E. HAMLIN, of counsel,) for appellee.

Mr. JUSTICE VICKERS delivered the opinion of the court:

Paul W. Abt, as county treasurer and collector of taxes for St. Clair county, made application to the county court, at the June term thereof, 1911, for judgment against certain lands and lots described in the delinquent list, for the taxes due and unpaid for the year 1910. Frank B. Bowman filed fifteen objections to the rendition of judgment against the lots and lands described in the delinquent list owned by him. Some of these objections were sustained in part and the amount for which judgment was asked was reduced and judgment was rendered for the amount for which the court found the lots and lands were liable. Other of the objections were overruled altogether and judgment rendered for the amount shown to be due by the collector's books. The judgment was excepted to by the objector, and he has brought the record to this court by an appeal.

Appellant's first objection questions the validity of the county taxes because, it is alleged, a number of items are not sufficiently specific and are for that reason not prop-

erly levied upon appellant's property. The several items of county taxes to which appellant made objection are as follows: For warrants of the board of election commissioners, \$7500; for salary, clerk hire and expenses of the county treasurer, \$4500; for county farm, \$25,000; for county jail, \$15,000; for workhouse, \$1200; for court house, \$35,000; for salaries of county appointees, \$15,000; for other salaries, \$4500; for State institutions, \$5000; for assessments, \$2000; for fees of county officers, \$15,000; for stenographer's fees, \$150; for bridges, \$5000; for sundry and general expenses, the exact nature of which cannot be ascertained in advance, \$1000.

Appellant objects to the first item, being a levy "for warrants of the board of election commissioners, \$7500." The specific objection made to this item is, "that there is nothing in the statute which authorizes the board of election commissioners to issue warrants against the county funds." The city of East St. Louis, in said county, has a board of election commissioners, under whose supervision elections in that city are held. Appellant apparently overlooked paragraphs 284, 285 and 286 of the Election law, (Hurd's Stat. 1908, p. 981,) which make provision for the payment of the expenses of all elections held in cities which have adopted the act, and which make special provision for the registration of voters and the conducting of elections in cities where that act has been adopted. Paragraph 284 provides for the payment by the city of all the expenses of holding city elections and special elections in any part of such city at which a city officer is elected. Paragraph 285 provides for the payment by the county of such expenses at all general county and State elections held in such city. It will thus be seen that by these two sections elections held in such city are divided into two classes, and the expense of holding one class is to be paid by the city and the expense of the other class by the county. Paragraph 286 of the act provides that "said board of election commissioners

shall audit all the claims of judges and clerks of election and shall draw a warrant therefor upon such city or county treasury, as the case may be." This statute expressly authorizes the board of election commissioners to draw warrants on the county treasury for the expenses of holding county and State elections, and it was therefore within the power of the board of supervisors to levy a tax to pay warrants drawn upon the county treasury in payment of the expenses of such elections as are properly chargeable to the county. This tax has nothing to do with the salaries of the board of election commissioners and their clerks. There is a levy of \$4600 in another item which is not objected to, that is levied for the salaries of clerk and members of the board of election commissioners. The salaries of the clerk and members of the board of election commissioners are fixed by the statute for the several classes of counties and are specifically made payable out of the county treasury upon the warrant of the county judge, while the expenses of the board of election commissioners other than salary are to be paid by the city upon the warrant of the county judge. The items for which the board of election commissioners are authorized to draw warrants upon the county treasury are not the expenses of the board but the expenses of holding elections for county and State officers. There is also another item of \$12,000 levied for election expenses, and this item is not objected to, but it is insisted by appellant that all expenses in connection with elections which the county is liable for should be paid from this general levy. We see no objection to separating the election expenses into two items, since the claims for county and State elections held in the city of East St. Louis are to be audited and paid on the warrant of the board of election commissioners, while the election expenses for the county outside of the city are to be audited and paid by the board of supervisors. It was entirely proper to levy a separate tax to meet these two items of county expenses. The ob-

jection to the levy for warrants of the board of election commissioners was properly overruled.

The next item objected to is "for salary, clerk hire and expenses of the county treasurer, \$4500." There are two objections made to this item: First, that the salary of the county treasurer is payable only out of fees of his office; and second, that it is illegal because it groups "salary, clerk hire and expenses" and levies a gross sum for those purposes. Under the statute the county treasurer is *ex officio* supervisor of assessments, and the statute provides that in counties of the class to which St. Clair belongs, the compensation of the treasurer for supervising assessments is \$1000 per annum. The county board fixes the compensation of the treasurer for his work as treasurer by resolution, and under the law his salary as treasurer is only payable out of fees and commissions. The amount thus fixed is the only compensation to which such treasurer is entitled. The act of 1898, making the county treasurer *ex officio* supervisor of assessments, did not create a new office but simply added new duties to the office of county treasurer. (*Foote v. Lake County*, 206 Ill. 185; *Parker v. Richland County*, 214 id. 165.) The amount fixed by section 2 of the act of 1898 as compensation to the county treasurer as supervisor of assessments makes such amount an earning of the office, the same as any other fees or commissions, and when paid by the county must be applied, like other earnings, to the payment of the salary fixed by the county board as salary for the office of county treasurer. Since the county must pay the county treasurer the amount due him as supervisor of assessments, it was proper to levy a tax for such purpose. The second objection to this item is not well taken. There is no valid objection to levying a gross sum for several different purposes where the several purposes are properly embraced with some general designation; and particularly is this true where it is difficult, in advance, to determine the amount of the sev-

eral items. This court has steadily adhered to the rule that it is necessary to a valid levy of county taxes to state the amount for each purpose separately. In the construction and enforcement of the statute which imposes this duty upon the county board this court has sought to give the statute a reasonable and common sense meaning, so as to avoid making it difficult or impossible for boards to levy county taxes. Thus, in *People v. Cairo, Vincennes and Chicago Railway Co.* 237 Ill. 312, this court held that the term "court expenses" was sufficiently definite without specifying a particular sum for jury fees, bailiff fees, and the like. "Salary, clerk hire and expenses of county treasurer" would seem to be sufficiently definite to give the tax-payer information respecting the purposes for which the tax was levied. The objection to this item was properly overruled.

The next item to which objection is taken is \$25,000 for county farm. The objection to this item is that it is not sufficiently certain. Following this are items "for county jail, \$15,000," "for workhouse, \$1200," and "for court house, \$35,000," all of which are objected to because they are not sufficiently specific and certain. In our opinion the objection to these items should have been sustained for the reason stated. Twenty-five thousand dollars "for county farm," \$15,000 "for county jail," \$1200 "for workhouse" and \$35,000 "for court house" does not disclose whether the money is levied to buy grounds and buildings or to improve buildings, or for the general running expenses of the several public places mentioned. In *People v. Cairo, Vincennes and Chicago Railway Co.* 243 Ill. 217, this court held that a levy for "public buildings account" and "county jail fund account" was not sufficiently specific to meet the requirements of section 121 of the Revenue act. We do not see what information the tax-payer would be able to get from the expressions "for court house," "for workhouse," "for county jail" and "for county farm." These several expressions are so vague and general that

they might be construed to apply to any one of several different purposes.

There is an item objected to of \$15,000 which is levied for "salaries of county appointees." There is no intimation as to who these appointees are, by whom they are to be appointed or for what purpose, or what the compensation of any of said appointees is. The objection to this item should have been sustained. The same observation applies to the levy of \$4500 "for other salaries." These items are entirely too general, and may be equally applicable to any one of a number of different officers.

The next item objected to is, "for State institutions, \$5000." This item is objected to because, it is said, there is no law making the county liable to contribute to the support of State institutions; that State institutions are supported by funds provided by the legislature, and hence this item is improperly levied. It is not claimed that this item is not sufficiently specific. It was manifestly levied to pay for the support and maintenance of insane paupers in the insane hospitals of the State. The county may become liable to State institutions for the maintenance of insane paupers that are committed to the State institutions, and this levy is sustainable under the law that imposes such liability on the county.

The next item objected to is the levy "for assessments, \$2000." Appellee contends that this item is to cover the expenses necessarily incurred in revising the assessments of the county. If so, it should have been stated to be for such purpose. The words used, "for assessments," may have different meanings. The tax-payer is entitled to know the purpose for which the tax is levied. This levy does not furnish such information.

The next item objected to is "for fees of county officers, \$15,000." It is objected that this item should have been more specific. In our opinion this objection is not well taken. There are certain classes of services rendered

by the county clerk in connection with making up transcripts of taxable property, keeping assessor's return, extending State and county taxes, and various other services in connection with the revenue, for which he is allowed by law certain fees which are to be paid by the county. So, also, is the circuit clerk allowed fees for attending upon courts, and the sheriff is allowed fees in criminal cases where the defendant is acquitted or otherwise discharged without the payment of costs. All of these fees, and others of like character, are to be paid in the first instance by the county, and are to be by the respective officers charged to themselves and applied to the payment of their salaries. We are of the opinion that a levy for fees of county officers, taken in connection with the statute, is sufficiently certain and definite to give the tax-payer information as to the purpose for which such taxes are levied.

The objection to the item of \$150 "for stenographer's fees" was properly overruled.

The item next objected to is \$5000 for bridges. The only objection here made to this item is that it is not sufficiently certain. This tax was evidently levied to enable the county to aid townships in building bridges whenever a proper petition was presented showing that the county was liable to contribute one-half of the cost of constructing a bridge. Appellant relies on the case of *People v. Chicago and Northwestern Railway Co.* 249 Ill. 170, in support of his objection to this item. In that case the levy was for bridges, \$25,000. In connection with the other evidence in that case certain petitions for county aid in the building of bridges were introduced in evidence. It was found upon examination that some of these petitions were insufficient to justify an appropriation of county funds for the purposes stated. The holding of this court was that the objection should have been sustained to that part of the bridge levy which was called for by the insufficient petitions, and that as to that part called for by the petitions of townships

which showed that the county was liable it should have been overruled. In the case at bar the levy is for the purpose of raising a fund to meet such proper calls as may be made upon the county to aid in the construction of bridges. This court, in effect, held that the levy "for bridges" was sufficiently definite, and that the item "bridges" fairly includes the building of new bridges, the repair of old ones and the building of approaches or abutments. The only objection here being that this levy is not sufficiently certain, the court did not err in overruling such objection.

The next item objected to is \$1000 "for sundry and general expenses, the exact nature of which cannot be ascertained in advance." This objection was properly overruled. While the levy is not for "contingent expenses" in terms, yet from the language employed it is clear that such was the purpose in making this levy. Such levies, when reasonable, have been sustained by this court. Whether or not a levy for contingent expenses is valid depends upon the amount levied, when considered in connection with the size of the municipality levying the same. In *People v. Chicago, Burlington and Quincy Railroad Co.* 248 Ill. 81, this court held that \$500 levied for contingent expenses in Whiteside county was an unreasonable charge and therefore not valid, while in the case of *People v. Illinois Central Railroad Co.* 237 Ill. 324, this court held that \$1000 levied for contingent expenses in Winnebago county was not an unreasonable amount. St. Clair county is a much larger and more populous county than Winnebago. Treating this item as a levy for contingent expenses, as we think it is, the objection was properly overruled.

Appellant objects to all of the taxes levied by the city of East St. Louis on the ground that the appropriation ordinance was not published in the manner required by law. Appropriation ordinance No. 1633 was properly passed by the city council but was not published within one month thereafter, as required by the statute. That ordinance was

therefore invalid. Subsequently, and within the time required, the city council passed ordinance No. 1634, which was also an appropriation ordinance, and that ordinance was published in the manner and within the time required by the statute. The specific objection made to the city taxes of East St. Louis is, that the second appropriation ordinance recited in its title that it was an ordinance to amend ordinance No. 1633, and since that ordinance never, in fact, became an ordinance at all for want of publication, the second ordinance, purporting to amend a void ordinance, is invalid. This contention cannot be sustained. Ordinance No. 1634 is a complete ordinance in and of itself, and appropriates \$581,000 to defray the necessary expenses and liabilities of said city and distributes the appropriation to the various purposes and departments of the city government. The reference to ordinance No. 1633 in the title does not affect the body of the ordinance and may be rejected as surplusage. This being the only objection to the city taxes of East St. Louis, the court did not err in overruling it.

Appellant objects to the whole of the tax levy by the East Side Levee and Sanitary District. Said district was organized under an act of the legislature passed in 1907 and embraces territory in both Madison and St. Clair counties. For the year 1910 the board of trustees of said district levied taxes as follows:

Trustees' salaries.....	\$6,000
Treasury department	1,600
Clerical department	10,300
Legal department	11,000
Engineering department	27,000
For purchase of right of way for levees.....	<u>55,900</u>
Total amount levied for current annual ex-	
penses.....	\$111,800
For payment of principal of bonds of said district	
dated Sept. 1, 1910, and payable Sept. 1, 1911..	450,000
For semi-annual interest on said bonds, two items	
of \$11,250 each.....	<u>22,500</u>
Total amount appropriated for all purposes..	\$584,300

On the 25th of July the board of trustees passed an appropriation ordinance, by which the following appropriations were made:

For trustees' salaries.....	\$6,000
Clerical department	10,300
Treasury department	1,600
Legal department	11,000
Engineering department	27,000
Right of way.....	55,900
For construction of levees, drains and ditches...	450,000
Total	<u>\$561,800</u>

By comparing the levy with the appropriation ordinance the following differences will be noted: (a) The levy ordinance is \$22,500 more than the appropriation; (b) in the appropriation ordinance \$450,000 is set apart for the construction of levees, drains and ditches, while in the levy ordinance the same amount is levied for the payment of bonds; (c) in the levy ordinance there are two items of \$11,250 each, levied for the payment of semi-annual interest on bonds, while there is nothing in the appropriation ordinance relating either to bonds or interest.

Appellant objects to the whole of the sanitary district tax because the appropriation ordinance was not passed during the first quarter of the fiscal year, and numerous decisions of this court are cited which hold that the statute which requires the passage of an appropriation ordinance by the city council and board of trustees of villages is mandatory. Counsel for appellant proceed on the assumption that paragraph 89 of the Cities and Villages act applies to sanitary districts. That paragraph has no application whatever to municipalities other than cities and villages. It is limited by its terms to these municipalities and does not apply to any other. There are numerous municipalities, such as school districts, road districts, townships, drainage districts, and the like, that have power to levy taxes, which do not come within the purview of paragraph 89 of the Cities and Villages act. Section 121 of the Revenue act pro-

vides that the county boards of the respective counties shall annually, at the September session, determine the amount of taxes to be raised for county purposes, and requires that the several purposes for which the levy is made shall be stated separately. This section, however, has no application to a sanitary district. There is nothing in the act of the legislature under which the sanitary district was organized that requires the board of trustees to pass an annual levy ordinance during the first quarter of the fiscal year. The only limitation in regard to the levy of taxes by the sanitary district is found in section 17 of the act under which said district was organized. That section provides that the taxes shall be levied by an ordinance specifying the purposes for which the same are required, and a certified copy of such ordinance is required to be filed with the county clerk in which said district was organized, on or before the second Tuesday in August, as provided by section 122 of the general Revenue law. It will be seen that there is no requirement as to the time when the levy ordinance is to be passed, provided it is passed in time to be filed with the county clerk before the second Tuesday in August. No point is made that the ordinance did not sufficiently specify the purposes for which the several items of taxes were levied.

Appellant also objects to the sanitary district tax because \$450,000 of the levy was made to pay the principal of bonds of the district issued September 1, 1910, and payable September 1, 1911. Appellant contends that the issuing of these bonds was a mere subterfuge to avoid the provisions of the statute in relation to scaling of certain items of taxes under the law of 1909. Under that law this court held in *People v. Chicago and Alton Railroad Co.* 248 Ill. 417, that taxes levied by a sanitary district for general purposes were not exempt from reduction under the amended Revenue law of 1909 as "levee taxes." Section 2 of the amended Revenue act of June 14, 1909, provides

that "no reduction of any tax levy made hereunder shall diminish any amount appropriated by corporate or taxing authorities for the payment of the principal or interest on bonded debt, or levied pursuant to the mandate or judgment of any court of record. And to that end every such taxing body shall certify to the county clerk with its tax levy, the amount thereof required for any such purposes." Appellant contends that the item of \$2.46 on the \$100 valuation for bonded indebtedness was, in fact and in substance, a levy to pay for work on levees, ditches and drains during the current year, and that such item was subject to reduction under the Revenue law of 1909, notwithstanding it was, in form, a levy to pay bonded indebtedness of the district. The power of the sanitary district to issue bonds is not questioned up to the constitutional limit of five per cent of the assessed value of the property in the district. The district has no power to issue bonds running longer than twenty years, but it may issue bonds for any shorter period. There is nothing in the statute or in the constitution that prohibits a municipality from issuing bonds in good faith and for a proper purpose, payable in one year. This power existed in the sanitary district before the passage of the amended Revenue act in 1909. There is nothing in the Revenue act that takes away the powers of the sanitary district that existed when that act took effect. There is no evidence in this record which tends to impeach the good faith of the board of trustees of the sanitary district in issuing these one-year bonds, and in the absence of any proof to the contrary we must presume good faith in these officials. The bonds having been issued in good faith by the board of trustees for a proper corporate purpose, the mere fact that they mature in one year from date of issue is no reason why the levy made to pay them should be treated as a levy for current expenses, thereby subjecting the levy to a reduction under the amended law of 1909. It is not claimed that there was any outstanding indebted-

ness against the district at the time these bonds were issued. The board of trustees, in the exercise of their discretion, deemed it advisable to borrow money for one year and issue bonds therefor. Whether the method pursued was more advantageous to the district than to issue anticipation warrants or to contract for work to be paid for as the taxes were collected were questions to be determined by the board of trustees, and the exercise of their judgment in that regard is not the subject of review by the courts. Section 12 of article 9 of the constitution of 1870 limits the powers of municipal corporations in contracting debts to five per cent on the value of the taxable property of such corporations as ascertained by the last assessment for State and county taxes. Said section also provides that before or at the time of incurring such indebtedness such municipality shall provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due and to pay and discharge the principal thereof within twenty years from the date of contracting the same. The sanitary district made provision, by its levy ordinance of July 6, for the payment of the principal and interest on these bonds by levying a tax sufficient to pay both principal and interest as the same matured. Appellant's principal contention is that the levy to pay bonded indebtedness should be scaled under the Revenue law as amended in 1909, on the ground that the levy for bonded indebtedness was a mere shift and device to obviate a reduction under the Revenue law. This argument seems to us to prove too much. The tax complained of was levied for the purpose of paying bonded indebtedness and interest thereon. This was the purpose stated in the ordinance for which such levy was made. If such purpose is illegal, then the tax should be held void entirely, instead of holding that it is subject to be scaled. The court would have no power, in any event, to change a levy made to pay bonded indebtedness and interest to a levy for current expenses or other corporate purpose. The

court did not err in overruling this objection to the sanitary district tax.

The appellant further objects to the sanitary district tax because he says that if the county clerks in Madison and St. Clair counties, in which said sanitary district is located, performed their duties under the amended Revenue law of 1909 it will destroy the uniformity of tax rate in the two counties, and thus render section 17 of the Sanitary District act unconstitutional. If this argument has any force it should be applied to the amended Revenue law of 1909, under the operation of which the want of uniformity is brought about, rather than to the Sanitary District act of 1907, which, considered alone, is a valid constitutional act. Appellant's argument on this point is based on the assumption that Granite City had a higher aggregate rate of taxes than East St. Louis, which was taken by the county clerk as the basis for finding the rate in the district. This is a misapprehension. The total aggregate rate in Granite City, in Madison county, is \$8.38 on the \$100, but in this aggregate are included thirty cents State tax, seventy-seven cents school building tax and fifty-six cents road and bridge tax, which are to be excluded from the aggregate, which brings the rate down to \$6.75 to which the scaling process should be applied. The total aggregate in East St. Louis is \$8.10, but it is reduced, by excluding the State tax, the school building tax of forty-five cents and sixteen cents illegal tax, to \$7.19 as the total rate to which the scaling must be applied. Appellant's argument on this point being based on an erroneous assumption as to the facts, is without force.

The judgment of the county court is reversed in part and the cause remanded, with directions to enter a judgment in accordance with the views herein expressed.

Reversed in part and remanded.

THOMAS L. ALDRIDGE *et al.* Plaintiffs in Error, *vs.* THE
CLEAR CREEK DRAINAGE AND LEVEE DISTRICT *et al.*
Defendants in Error.

Opinion filed December 21, 1911—Rehearing denied Feb. 19, 1912.

1. DRAINAGE—*facts essential to jurisdiction of the county court must appear of record.* County courts derive their power to establish drainage districts solely from the statutes, and every fact essential to such jurisdiction must affirmatively appear of record when the court's action is sought to be reviewed in a direct proceeding.

2. SAME—*petition must be such as law prescribes.* The conditions upon which the creation of drainage districts has been authorized by the legislature must be complied with and the petition must be such as the statute prescribes.

3. SAME—*the law in force when petition was filed governs sufficiency of a petition.* The sufficiency of a petition to organize a drainage district must be tested by the law in force when the petition was filed.

4. SAME—*description of proposed ditches is an essential element of a petition under the Levee act of 1885.* Under the Levee act of 1885 (Laws of 1885, p. 108,) the petition must set forth a description of the proposed starting point, route and terminus of the work, and in the absence of such description the court is without jurisdiction to organize the district or to sustain an order establishing the same. (*People v. Munroe*, 227 Ill. 604, and *People v. Lingle*, 165 id. 65, distinguished.)

5. SAME—*writ of error is not barred by delay short of statutory period.* Delay by land owners in a drainage district short of the statutory period for prosecuting a writ of error does not bar their right to such writ nor to a reversal for material errors, even though a less delay was held to justify refusing leave to file an information in *quo warranto* in which they were relators, charging the same errors in the organization of the district.

VICKERS, J., dissenting.

WRIT OF ERROR to the County Court of Union county;
the Hon. MONROE C. CRAWFORD, Judge, presiding.

R. J. STEPHENS, WILLIAM D. LYERLE, CHARLES C. CRAWFORD, W. W. BARR, CHARLES FEIRICH, GILBERT & GILBERT, and L. O. WHITNEL, (BLEWETT LEE, and W. S. HORTON, of counsel,) for plaintiffs in error.

A. NEY SESSIONS, and JAMES LINGLE, for defendants in error.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

At the May term, 1908, the county court of Union county, in pursuance of a petition filed in that court for the organization and establishment of a drainage district with the corporate name of Clear Creek Drainage and Levee District, entered a final order declaring the district duly established as provided by law. The plaintiffs in error, some of whom were residents and others non-residents of the district, and who were either named in the original petition as owners of lands therein or were afterward brought into the proceeding as such owners, sued out a writ of error from this court to review the proceedings.

In the assignment of errors it is alleged, among other things, that the original petition was insufficient to confer upon the county court jurisdiction to organize and establish the district, and the reason given in the brief and argument is, that it did not meet the requirements of the statute. County courts derive their power to establish drainage districts from the statute, alone, and every fact essential to the jurisdiction must affirmatively appear from the record. (*Payson v. People*, 175 Ill. 267.) The General Assembly having authorized the creation of drainage districts upon certain conditions, they must be complied with and the petition must be such as the statute prescribes. (*Drummer Creek Drainage District v. Roth*, 244 Ill. 68.) The proceeding to organize this district was under what is commonly known as the Levee act, and the petition was filed on March 16, 1907. Its sufficiency, therefore, is to be tested by the act then in force. (Laws of 1885, p. 108.) Section 2 of that act provided what the petition should contain. It was to be signed by a majority of the adult land owners representing one-third in area of the lands to be

reclaimed or benefited, and was to be filed in the county court of the county in which the greater part of the lands to be affected by the drain or drains, ditch or ditches, levee or levees, or other work proposed to be constructed, maintained or repaired, should lie, "setting forth the proposed name of said drainage district, the necessity of the same, with a description of proposed starting points, route and terminus of the work and a general description of the lands proposed to be affected, with the names of the owners when known, and, if the purpose of said owners is the repair and maintenance of a ditch or ditches, levee or levees, or other work, heretofore constructed under any law of this State, said petition shall give a general description of the same, with such particulars as may be deemed important, and may pray for the organization of a drainage district, by the name and boundaries proposed, and for the appointment of commissioners for the execution of such proposed work according to the provisions of this act: *Provided*, that in case the proposed work shall consist of a combined system of drainage independent of levees, no description of such drains and ditches in the petition shall be required."

The petition filed in the county court in this case is as follows:

"We, the undersigned petitioners, respectfully petition and represent as follows: That we are adults and desire the establishment and organization of a drainage and levee district in the counties of Union and Alexander, in said State of Illinois, under the laws of said State pertaining thereto; that the greater part of the lands to be embraced in such district lie in the said county of Union; that said district is desired and needed for agricultural and sanitary purposes; that these petitioners constitute, in the aggregate, a majority, or more, of all the owners of lands embraced within said proposed district; that these petitioners own, in the aggregate, one-third, or more, in area, of all the lands embraced within said proposed district; that the ob-

ject of this petition and of the organization of said proposed district is for the purpose of constructing, repairing and maintaining a drain or drains, ditch or ditches, levee or levees, embankments and grades, for the purpose of draining and conducting the waters from the lands of said proposed district, and for constructing and maintaining a system of levees or embankments to protect said lands from the waters of the Mississippi river, or any streams tributary thereto, in said district, and to provide said proposed district with the necessary pumps, machinery and other apparatus for the purpose aforesaid; that said proposed district be organized and maintained by special assessment upon the property included therein, as provided by law; that the name of said district be 'Clear Creek Drainage and Levee District;' that the lands in said proposed district are low and swampy and not susceptible of cultivation for the reason that they are subject to overflow from the rains and inundation from the waters of the Mississippi river, and a large part of said lands are actual swamps, and that by reason of being low and wet lands, producing noxious weeds and plants, the growth and decay of which causes malaria and sickness, the said lands are a cause of unsanitary conditions, and that by a system of drainage and levees said lands can be brought into cultivation and will cease to be unsanitary; that the said district shall consist of the lands bounded and described as follows:" (Here follow a very lengthy description, by boundaries, of a large area of land in Union and Alexander counties and the signatures of ninety petitioners, with the number of acres of land owned by each.)

A paper filed with the original petition gives the names of alleged owners of land in the district, with the number of acres owned by each, amounting in all to 39,816.59 acres.

The purpose of organizing the district was stated to be, constructing, repairing and maintaining a drain or drains, ditch or ditches, levee or levees, embankments and grades,

but the petition gave no description whatever of proposed starting points, route or terminus of any drain or drains, ditch or ditches, levee or levees, embankments or grades. It amounted only to a request to the court to adopt and carry out an indefinite and uncertain scheme for which the statute gave no authority. The evident purpose of the statute was, that those who would be specially assessed to pay the costs of the improvement should know from the petition specifically what was proposed to be done, so as to form a judgment as to the necessity or propriety of the work and its advantages or disadvantages. It was not intended that some scheme or plan should be evolved and developed by commissioners under the management of the court, and the starting points, route and terminus of the proposed work and the location of levees, drains and ditches should be determined, without any basis in the petition other than a request to form a drainage district. The statute required that the petitioners should themselves propose, in general terms, a scheme or plan of the desired work. If drainage and levee work was proposed the commissioners were required to examine the lands and determine whether the starting point, route and terminus of the proposed work were in all respects proper and feasible, and if not, what would be so. They were not confined to the point of commencement, route or termini of the drains or ditches or the location, plan or extent of any levee as proposed by the petitioners, but might propose changes to be submitted to the court. Without any description in the petition they could not comply with the statute, and the description was an essential element of the petition.

Counsel for defendants in error say that the description of the work was sufficient under our decision in *People v. Munroe*, 227 Ill. 604, but in this they are mistaken. The statute authorized a proceeding to establish in a drainage district a combined system of drainage or protection from overflow independent of levees, and contained a proviso

(omitted from the present act) that if the proposed work should be of that character no description of the drains and ditches in the petition should be required. The petition in that case stated that the purpose was to establish and maintain a combined system of drainage and protection from overflow "independent of levees," and it was because the petition came within the terms of the proviso that it was held sufficient. The fact that the proviso was added excepting drainage districts where the scheme was for drainage independent of levees is well nigh conclusive that the description could not be omitted in an organization of other districts. Considering that exception from the general rule in connection with the proviso in section 3 that it should not invalidate the notice of the presentation and filing of the petition if no description of drains or ditches was given therein, there can be no other conclusion than that the description was intended to be a necessary and essential element of a petition.

Counsel further say that in the case just referred to the court followed the decision in *People v. Lingle*, 165 Ill. 65; that under the Local Improvement act the requirement that an ordinance should specify the nature, character, locality and description of the contemplated improvement was not jurisdictional. If the court had made such a decision it would not affect this case because that was a collateral attack upon a judgment, where only jurisdictional questions can be considered, while the writ of error in this case was sued out to review the proceeding and to determine whether errors were committed. But it was not decided that an ordinance not specifying in any manner the nature, character, locality and description of an improvement would confer jurisdiction. If an ordinance contains the necessary elements of description provided by the statute an objection that it is not sufficiently specific will not affect the jurisdiction, but it has never been held that an ordinance which merely provided that a sidewalk, sewer or other improve-

ment should be constructed within a certain territory would support a judgment confirming a special assessment, but the contrary was clearly implied in *Gross v. People*, 172 Ill. 571, and other cases.

It must be held that the petition in this case was lacking in an essential element required by the statute, and was therefore insufficient to authorize the court to proceed to the organization and establishment of a drainage district or to sustain the order establishing the same. The petition being insufficient, there is no occasion to consider errors assigned with respect to notices and subsequent proceedings.

The court was without jurisdiction for want of a petition complying with the statute, and its proceedings and order were void. It was not necessary that there should be any exception to the order. *Drummer Creek Drainage District v. Roth*, *supra*.

Some of the plaintiffs were relators in an information in the nature of *quo warranto* presented by the State's attorney of Union county to the circuit court with a request for leave to file the same, and the request having been refused, we held that the court, in the exercise of a discretion conferred by law in such cases, did not err in the refusal. (*People v. Rendleman*, 250 Ill. 289.) The plaintiffs in error include others who were not parties to that proceeding, but if the parties were identical the rule of law is not the same, and we cannot deny to the plaintiffs in error their right to a review of the proceedings, nor to a reversal on account of material error, because of any delay within the time allowed by the statute for prosecuting the writ.

The order of the county court is reversed and the cause remanded.

Reversed and remanded.

Mr. JUSTICE VICKERS, dissenting.

H. W. RILEY, Respondent, *vs.* L. J. LAMSON *et al.*
Petitioners.

Decision announced orally February 22, 1912.

1. PRACTICE—*Supreme Court can only review final judgments of the Appellate Court.* Only those judgments of the Appellate Court which are final are subject to review by the Supreme Court under section 121 of the Practice act.

2. SAME—*judgment reversing and remanding is not final judgment.* A judgment of the Appellate Court reversing the judgment of the trial court and remanding the cause for a new trial is not a final judgment which the Supreme Court may review, even though it may settle one issue in the case so far as the trial court and the Appellate Court are concerned, if there are other issues to be determined on the new trial. (*International Bank v. Jenkins*, 104 Ill. 143, and *Mitchell v. King*, 187 id. 452, distinguished.)

PETITION for writ of *certiorari*.

HENRY I. GREEN, and MOSES, ROSENTHAL & KENNEDY, (JOSEPH W. MOSES, and WALTER BACHRACH, of counsel,) for petitioners.

LEFORGEE, VAIL & MILLER, for respondent.

Mr. JUSTICE DUNN announced the decision of the court:

The respondent sued the petitioners and S. L. Rufty in the circuit court of Champaign county in an action of assumpsit for goods sold, money lent and money lost in gambling on the future prices of grain. Summons was served on Rufty in Champaign county and on the petitioners in Cook county. The suit was dismissed as to Rufty and an amended declaration filed against the petitioners, only. Thereupon the petitioners, who resided in Cook county, objected to the jurisdiction of the court to proceed against them. The court overruled their objections and after a trial rendered a judgment against them for

\$6802.55 and costs. The petitioners appealed to the Appellate Court for the Third District, assigning for error various rulings of the court made during the progress of the cause and on the trial, as well as its action in retaining jurisdiction of the cause after the dismissal as to Rufty. They sought to have the judgment reversed without a remandment of the cause, for the alleged lack of jurisdiction of the circuit court. The Appellate Court reversed the judgment and remanded the cause for a new trial. The petitioners now seek to have the record of the Appellate Court certified to us for review.

We can only review the final judgments of the Appellate Court. A judgment of reversal remanding a cause for a new trial is not appealable. (*Partridge v. Stevens*, 187 Ill. 383; *Callahan & Son v. Ball*, 197 id. 318.) It is suggested in the petition that the controlling issue presented by the errors assigned in the Appellate Court related to the jurisdiction of the trial court to take cognizance of the action and that the judgment of the Appellate Court has finally determined that issue adversely to the petitioners, so that the trial court can do nothing but follow the mandate of the Appellate Court. That was, however, but one of several issues in the Appellate Court. The other issues may yet determine the litigation in the petitioners' favor. The petitioners, by assigning error on the decision of the jurisdictional question alone, might have had a final judgment in the Appellate Court, but they did not choose to do so. In *International Bank v. Jenkins*, 104 Ill. 143, a single issue was presented to the Appellate Court by a plea of the Statute of Limitations to the writ of error, and a judgment of reversal on sustaining a demurrer to the plea was held to be final. It was a final determination of the only question litigated in the Appellate Court; but it was clearly shown in *Trustees of Schools v. Potter*, 108 Ill. 433, distinguishing the case of *International Bank v. Jenkins*, that a judgment of reversal upon one of several issues presented

in the Appellate Court, remanding the cause for a new trial, is not a final judgment.

Mitchell v. King, 187 Ill. 452, is also relied on by the petitioners. In that case a motion was made in the circuit court to vacate a judgment by default because the summons was issued after the death of the plaintiff. The motion was denied, but the Appellate Court reversed the judgment and remanded the cause, with directions to vacate the judgment. This was held to be a final and appealable judgment. It finally settled the only issue, and that issue could never again be litigated in any court. The present case is entirely different. One question, that of the jurisdiction of the petitioners' persons, has been settled so far as the circuit court and Appellate Court are concerned, but other issues remain undetermined and judgment may never be rendered against the petitioners.

The petition is denied.

Petition denied.

JOHN WEIGAND, Appellant, vs. MARIE M. RUTSCHKE et al.
Appellees.

Opinion filed February 23, 1912.

1. WITNESSES—*extent to which husband of a deceased grantor may testify as to delivery of the deed.* The husband of a deceased grantor cannot testify to any of her statements or conversations for the purpose of showing delivery of the deed, but he may testify to the acts which he witnessed with reference to such delivery.

2. DEEDS—*question of delivery of deed is a mixed question of law and fact.* Whether a deed was delivered so as to take effect as a present conveyance of the title is a mixed question of law and fact, to be determined from a consideration of the words and acts of the parties in connection with the circumstances surrounding the transaction.

3. SAME—*mere placing of a deed in hands of grantee is not necessarily a delivery.* The mere placing of a deed in the hands of the grantee does not necessarily constitute a delivery, but the

question is whether the deed was then intended by the parties to take effect according to its terms.

4. SAME—*what acts conclusively show that deed was not intended to operate immediately.* The facts that the grantor in a voluntary conveyance in the form of a statutory warranty deed containing no restrictions did not want the deed recorded until her death, and that after handing the deed to the grantee she took possession of it again and kept it under her control until her death, paying the taxes on the property and keeping it in repair and requiring the grantee to pay rent, conclusively show that the parties did not intend the deed should immediately become operative.

5. SAME—*fact that grantor intended deed to become operative at her death is not sufficient.* The fact that the grantor in a statutory warranty deed to her daughter intended the deed to become operative at her death does not make the deed effective even though it is a voluntary conveyance, where there is no delivery before that time with the present intention of passing the title according to the terms of the deed.

6. SAME—*when retention of a deed and control of property by grantor are inconsistent with delivery.* Where a deed is a statutory warranty deed without any reservation of a life estate in the grantor, the facts that the grantor, after handing the deed to the grantee, takes possession of it again and retains control of it and the property until her death, paying taxes and keeping up repairs and requiring the grantee to pay rent, are inconsistent with the vesting of title in the grantee according to the terms of the deed.

7. PARTIES—*bill to set aside deed should make all persons parties who are entitled to share in the land.* A bill to set aside a deed should make all persons entitled to share in the land, in the event the deed is set aside, parties to the suit, in order that the decree rendered may be binding upon all interests.

APPEAL from the Circuit Court of Sangamon county;
the Hon. JAMES A. CREIGHTON, Judge, presiding.

GEORGE M. MORGAN, for appellant.

JOHN G. FRIEDMEYER, and C. A. JONES, for appellees.

Mr. JUSTICE DUNN delivered the opinion of the court:

The appellant, John Weigand, filed his bill in the circuit court of Sangamon county to set aside a deed from Marie E. Weigand, his mother, (now dead,) to Marie M.

Rutschke, his sister, on the ground that it had not been delivered. The court dismissed the bill after a hearing upon the evidence, and the complainant having appealed, insists that the decree is contrary to the evidence.

Marie E. Weigand, in July, 1903, was the owner of real estate in the city of Springfield, including the property in controversy, which was then a vacant lot. Michael Weigand was her husband, and they had three sons, John, Fred and Henry, and two daughters, Catherine Cole and the appellee Marie. Marie was then soon to be married to appellee Paul Rutschke, and her parents signed a deed, dated July 7, 1903, conveying the lot in controversy to her, which was acknowledged before a notary public on August 25, 1903. Mrs. Weigand during the summer of 1903 built a dwelling house on the lot, and immediately after their marriage, which occurred in the summer or fall of that year, it was occupied by Marie and her husband, who have occupied it ever since. They paid rent to Mrs. Weigand, and Mrs. Weigand paid the taxes, made repairs and kept the house insured at her own expense. She died in May, 1909, leaving a will, naming her daughter Mrs. Rutschke as executrix, by which, after giving a life estate to her husband in certain real estate other than the lot in controversy, she disposed of all the remainder of her property without describing any of it specifically. The deed had not been recorded but was kept with other papers in a tin box, of which Mrs. Weigand had the key. Shortly after her mother's death Mrs. Rutschke took the deed and had it recorded.

The competent testimony in regard to the delivery of the deed besides that of Michael Weigand, the husband, consisted of statements made by Mrs. Weigand to various persons, before her daughter's marriage and afterward, that she intended to give that lot to Marie and that she intended to build a house on it for her; that she had given her the lot, and that she had given the deed for the lot to Marie and intended to build the house on the lot for her. She

also stated that she did not want the deed recorded until her death, and that Marie was to pay rent for the house until her death and then the deed could be recorded afterward. Michael Weigand testified that after the deed had been signed and taken home his wife handed it to Marie, who handed it back to her, and it was then put in the tin box, where it was when Mrs. Weigand died. This was a box belonging to his wife, in which she kept papers. It was locked and she kept the key. Mrs. Rutschke had papers belonging to her in the box and all the members of the family had papers in it. Mrs. Weigand permitted other members of the family to put papers in the box. If any of the family wanted to put papers in the box she would put them in herself, and whenever they wanted their papers they would go to her and ask for them. When the box was opened it contained other papers, among them the will of Mrs. Rutschke. The testimony of this witness was objected to because he was the husband of Mrs. Weigand, and so far as it refers to any statements made by Mrs. Weigand or any of her conversation it was incompetent, but he was a competent witness to testify as to the delivery of the deed. (*Baker v. Baker*, 239 Ill. 82; *White v. Willard*, 232 id. 464.) Mrs. Rutschke and her husband both testified before the master, but it is conceded that they were not competent witnesses and their testimony cannot be considered.

Whether the deed was delivered so as to take effect as a present conveyance of the title was a mixed question of law and fact, to be determined from a consideration of the words and acts of the parties in connection with the circumstances surrounding the transaction. It is indispensable to a delivery that the grantor shall part with control over the deed, with the intention that it shall immediately become operative to convey the estate described in it. (*Byars v. Spencer*, 101 Ill. 429; *Cline v. Jones*, 111 id. 563; *Provart v. Harris*, 150 id. 40; *Wilson v. Wilson*, 158 id. 567; *Shults v. Shults*, 159 id. 654; *Brown v. Brown*,

167 id. 631; *Walter v. Way*, 170 id. 96.) The mere placing of a deed in the hands of the grantee does not necessarily constitute a delivery. The question is one of intention whether the deed was then intended by the parties to take effect according to its terms. *Wilson v. Wilson*, *supra*; *Oliver v. Oliver*, 149 Ill. 542; *Hollenbeck v. Hollenbeck*, 185 id. 101; *Russell v. Mitchell*, 223 id. 438; *Oswald v. Caldwell*, 225 id. 224; *Elliott v. Murray*, id. 107.

The instrument in question was a statutory warranty deed in the ordinary form, with no exceptions or reservations. If it had taken effect according to its terms it would have conveyed to the grantee a present estate in fee simple in the property. That it was not intended to be absolute and was not intended to operate immediately is conclusively shown by the acts of the parties. Though the grantee occupied the property as soon as it was ready for occupancy, she did so not claiming under the deed but as the tenant of her mother, to whom she paid rent, and the latter paid the taxes, repaired the property at her own expense and kept it insured in her own name. The deed itself was in the hands of the grantee for only a few minutes and was immediately handed back to the grantor, who did not wish it to be recorded, and it remained in her possession and under her dominion and control until her death. The instrument was in the nature of a voluntary settlement, and in such cases more liberal presumptions prevail in favor of the delivery of deeds than in cases of bargain and sale. (*Baker v. Hall*, 214 Ill. 364; *Riegel v. Riegel*, 243 id. 626; *Hill v. Kreiger*, 250 id. 408.) The intention of the grantor to have the title vest immediately in the grantee is regarded as more important in voluntary settlements than the manual possession of the deed, and the retention of the deed by the grantor is not conclusive against its validity if there are no other circumstances showing that the grantor did not intend it to be absolute. (*Cline v. Jones*, *supra*; *Shults v. Shults*, *supra*.) Where the deed reserves a life

estate to the grantor a presumption arises that the deed was intended to take effect immediately, since there would otherwise be no occasion for the reservation. (*Baker v. Hall, supra; Riegel v. Riegel, supra; Hill v. Kreiger, supra; Valter v. Blavka*, 195 Ill. 610.) In this case, however, there was no reservation in the deed, and in addition to retaining the possession and control of it the grantor continued to deal with the property as her own during her lifetime and required of the grantee the payment of rent. Such acts were inconsistent with the vesting of title in the grantee according to the deed. Had there been a delivery of the deed to a third party in escrow a different question would have arisen. An understanding that a grantor shall hold the deed until the performing of a condition or happening of a contingency is of no effect. It is certain that the grantor did not intend that the grantee should become the owner of this property, according to the terms of the deed, during the grantor's lifetime. It was the manifest intention that the daughter should have the property after her mother's death, but this intention not having been manifested in the manner required by the law for that purpose, cannot be given effect against the consent of the other heirs. *Cline v. Jones, supra; Spacy v. Ritter*, 214 Ill. 266; *Hawes v. Hawes*, 177 id. 409.

The only parties to this bill are the appellant and his sister (the grantee in the deed) and her husband. The other two brothers and the sister, under the will of Mrs. Weigand, are interested in her estate and the property here involved equally with the appellant and the appellee Mrs. Rutschke. They should be made parties to the suit in order that any decree which may be rendered may bind all interests, and the complainant should be permitted to amend his bill for that purpose.

The decree will be reversed and the cause remanded.

Reversed and remanded.

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,
vs. WILLIAM CONNORS *et al.* Plaintiffs in Error.

Opinion filed February 23, 1912.

1. CRIMINAL LAW—*specific intent is the gist of charge of assault with intent to murder.* In a prosecution for an assault with intent to murder or with intent to commit some other felony, the specific intent charged is the gist of the offense and must be proved as alleged.

2. SAME—*an intent to kill is specific though in the alternative.* An assault to murder may be complete where it is shown that the assailant, with the present ability to destroy life or do great bodily harm, draws a dangerous weapon on another and threatens to kill him if he does not immediately comply with some unlawful condition or demand.

3. SAME—*when an assault with intent to murder is complete.* The fact that the assailant, who has presented a deadly weapon and threatened to kill another if the latter does not comply with an unlawful demand, suspends his purpose to give the victim an opportunity to comply with such demand, does not prevent the offense of assault with intent to kill from being complete.

4. SAME—*when guilt must be determined the same as though the threat to kill was not accompanied by any demand.* Where a violent assault with a dangerous and deadly weapon is made upon a person in the peace of the people and a threat to destroy his life is made unless he complies with an unlawful demand, the guilt or innocence of the assailant must be determined precisely as though no unlawful demand had been made.

5. SAME—*when evidence of conversations with persons other than defendants is admissible.* In a prosecution against members of a labor union for an assault with intent to murder the prosecuting witness in an attack upon members of another labor union to which the prosecuting witness belonged, if the evidence fairly tends to show that certain persons other than the defendants were members of the attacking party, it is not error to allow the prosecuting witness to testify that such persons, a few days before the attack occurred, had visited the place where the attack was made, and he may testify as to what was then said concerning the matter of his membership in the union.

6. SAME—*when a conviction will be sustained notwithstanding evidence tending to establish an alibi.* A conviction for assault

with intent to murder will be sustained even though there is evidence tending to establish an alibi as to one of the defendants, where such evidence is controverted and the verdict is not clearly contrary to the weight of the evidence upon such matter.

WRIT OF ERROR to the Criminal Court of Cook county;
the Hon. MARCUS KAVANAGH, Judge, presiding.

DANIEL L. CRUCE, A. S. LANGILLE, O. J. C. WRAY,
and CHARLES E. ERBSTEIN, for plaintiffs in error.

W. H. STEAD, Attorney General, and JOHN E. W. WAY-
MAN, State's Attorney, (JOHN E. NORTHUP, and ROBERT
E. CROWE, of counsel,) for the People.

Mr. JUSTICE VICKERS delivered the opinion of the court:

Plaintiffs in error, William Connors, Peter Gentleman, Arthur O'Connor and Edward Storgaard, were jointly indicted, together with Walter Stevens and Joseph Kane, at the June term of the criminal court of Cook county, for an unlawful assault upon Morgan H. Bell. In the first count of the indictment the plaintiffs in error and others were charged with making a felonious assault upon Morgan H. Bell with a certain revolver, to then and there unlawfully, willfully and with malice aforethought kill and murder the said Morgan H. Bell. There were six other counts in the indictment, but since the verdict found plaintiffs in error guilty in manner and form as charged in the first count of the indictment it will not be necessary to refer to the other counts. At the August term of said court, Connors, Gentleman, O'Connor and Storgaard were found guilty by a jury of assault to murder, and after overruling a motion for a new trial and in arrest of judgment they were sentenced to imprisonment in the penitentiary upon the verdict of the jury. Stevens and Kane were granted a change of venue and were not put upon trial with plaintiffs in error. The alleged errors in the application of the law to

the undisputed facts are relied on by all of plaintiffs in error for a reversal. Plaintiff in error Arthur O'Connor contends that the verdict as to him is contrary to the clear weight and preponderance of the evidence and the motion for a new trial should have been sustained as to him for that reason.

The facts out of which the legal questions arise, which all of plaintiffs in error contend were erroneously decided against them, are, in substance, as follows: It appears from the evidence that on and before April 20, 1911, in the city of Chicago, there were two rival labor unions of steam-fitters and associated employments. One of these organizations was known as the International Association of Steam-fitters. The other organization was known as the United Association of Plumbers, Gas-fitters, Steam-fitters and Steam-fitters' Helpers. For convenience the United Association of Plumbers, Gas-fitters, Steam-fitters and Steam-fitters' Helpers will hereafter be referred to as the "United Association," and the International Association of Steam-fitters will be referred to as the "International Association." On April 20, 1911, a large two-story building was being erected for the use of the Hygienic Ice Company, facing west on South Park avenue, which runs north and south. Just north of Park avenue, running east and west, is Twenty-sixth street, which is occupied, in part, by the tracks of the Illinois Central Railroad Company. The building being constructed had two stories or two floors. On the lower floor there was a large room about 65 by 150 feet, and a boiler room and an engine room, from which a stairway led to the second floor. The second or upper floor of the building was substantially one large room. At the time of the occurrences out of which this prosecution grows the walls of the building were up, floors laid, and the doors and some of the windows were in place. On April 20, 1911, there were at work upon the two floors of this building about thirty steam-fitters and steam-fitters'

helpers, who were engaged in installing steam pipes on the two floors of this building. There were also a few other workmen of other trades employed at the time on the building, making a total of some forty workmen who were employed in completing the building. The steam-fitters employed upon this building at the time in question were members of the International Association. Joseph Kane, who is jointly indicted with plaintiffs in error, had been a member of the International Association for many years, but on April 18, two days before the alleged assault was committed, he had left the International Association and become a member of the United Association and at once became a business agent for the United Association, acting jointly in that capacity with Maurice (or Moss) Enright, who had been a business agent of the United Association for some time previous. The headquarters of the United Association were in the Bush Temple building, and a man by the name of Burke was the secretary of the general association of the United Association. The evidence shows that the United Association was seeking to absorb the membership of the International Association, and that for this purpose Burke, as secretary, had sent out a communication to all of the steam-fitters advising them to desert the International Association (which is also called the old association) and join the new one, known as the United Association. It is a fair and reasonable inference from the proven facts that the "business agency" of the United Association to which Kane was appointed immediately upon his desertion of the International Association was given him, in part, as a reward for his desertion of the International and going over to the United Association, and with the expectation that his former connection with the International Association and acquaintance among the membership of that organization would make him a useful man in proselyting members from the International Association. About ten o'clock in the forenoon of April 20, 1911, three

or four men, led by Joseph Kane, appeared on the lower floor of the Hygienic ice plant. Kane spoke to some of his old associates and informed them that he was now the business agent of the United Association. Kane and his associates remained in the building a minute or two, and then either went to the outer door or stepped out of the door and in a few seconds re-appeared on the lower floor with some fifteen or twenty other men. There is no dispute as to the presence of all of the plaintiffs in error on this occasion except as to Arthur O'Connor. The evidence shows that a large portion of the men who appeared in this building were armed with pistols. Their purpose in going there armed with revolvers is made manifest by what was done and said. Pistols were displayed and the members of the International Association were commanded to take off their overalls, cease work and go down and obtain cards of membership in the United Association and then return to their work. The men who were working on the lower floor went up-stairs, where they were followed by the attacking party. When the men were all gotten together on the upper floor they were lined up by the command of Kane and his associates and then commanded to take off their overalls and go down and get cards from the United Association. Naturally, in the excitement consequent upon a sudden attack of this character, the witnesses, honestly, no doubt, differ in describing the occurrences that took place. There is, however, a general agreement among the witnesses that the plaintiffs in error and their associates, through threats of violence and by the presentation of drawn revolvers, sought to compel the members of the International Association to cease work, take off their overalls and go down and join the United Association, threatening that unless this demand was complied with they would shoot or kill the members of the International Association. Morgan H. Bell, upon whom the alleged assault to murder was committed, at the time of the attack was at

work on the lower floor. The evidence shows that some-one of the attacking party, approaching Bell and Lefevre, said, "Get that big son-of-a-b——." The men walked up to Bell, and plaintiff in error Storgaard pulled a revolver partly out of his pocket, presented the point at Bell and told him to take off his overalls or "they would bore a hole through him." Bell succeeded in getting away at that time and went up-stairs, followed by two of his pursuers. Bell gives the following account of what occurred after he got up-stairs: "There was some of them got me there and put their guns up to me. One of them held two guns at my stomach and another one at my head, and told me if I didn't quit my fooling and get out of there they would fill me full of holes." Plaintiff in error Connors is identified as one of the men who held a pistol on Bell, accompanied by the threat above stated. This witness states that the revolvers were held against him until he began to remove his overalls. Plaintiff in error Gentleman is also identified as one of the men who made the attack upon Bell. The evidence shows that similar attacks were made upon other workmen, who were commanded to take off their overalls under pain of being shot, and to go down to Burke and get a permit to work. Two of plaintiffs in error, O'Connor and Connors, are shown to have made a similar attack upon one Lettker, commanding him to take off his overalls, and threatening that if he did not do so to bore a hole through him. Lettker complied with the request, as did also Bell and others, to the extent of taking off their overalls. Lettker says in his testimony: "I took the gentlemen at their word. You know they said they were going to bore a hole through me, and I didn't want to be riddled or killed, and I took the man's word." This witness identifies Kane, O'Connor, Connors, Gentleman and Storgaard as being present and participating in the assault. Pistols were also drawn upon Kapritzki, and he was commanded as were the others, and to him it was said, "If

you look for trouble I shoot you like a dog;" and again, "If you don't go right away you will get killed." A police station was only a block away. Some of the workmen had apparently escaped unnoticed and notified the police, and about the time that Kapritzki was being assaulted there was a cry of "Jiggers!" and "Coppers!" and at that moment a number of policemen appeared upon the scene. When the police arrived the attacking party made a hasty exit in all directions. Some of them ran down the Illinois Central tracks, some across the coal yards, and some in other directions. As he ran, plaintiff in error Gentleman was seen to throw a revolver away, and another, who went down the Illinois Central tracks, put his revolver by the fence, where it was afterwards picked up by a watchman and taken to the police station. All of the attacking party succeeded in making good their escape except plaintiff in error Storgaard, who was arrested by the police on the lower floor and a loaded revolver taken from him. The presence and participation of Storgaard and Gentleman in this affair is not denied. Connors testified that he was not present, but he is not corroborated in any substantial particular and the testimony is amply sufficient to justify a finding that he was present. Arthur O'Connor also denied that he was present, claiming that he was confined to his home at the time by illness. There is some evidence tending to corroborate O'Connor's testimony, which will be considered hereafter.

Plaintiffs in error contend that the trial court erred in giving instruction No. 9 on behalf of the prosecution. That instruction is as follows:

"The court instructs you as to the intent to kill alleged in the indictment, that though you must find that there was a specific intent to kill the prosecuting witness, Morgan H. Bell, still, if you believe, from the evidence, beyond a reasonable doubt, that the intention of the defendants was only in the alternative,—that is, if the defendants, or any

of them, acting for and with the others, then and there pointed a revolver at the said Bell with the intention of compelling him to take off his overalls and quit work, or to kill him if he did not,—and if that specific intent was formed in the minds of the defendants and the shooting of the said Bell with intent to kill was only prevented by the happening of the alternative,—that is, the compliance of the said Bell with the demand that he take off his overalls and quit work,—then the requirement of the law as to the specific intent is met.”

The plaintiffs in error earnestly contend that pointing a loaded revolver at another within shooting distance and threatening to shoot unless some demand made by the assaulting party is complied with cannot be held to be a felonious assault with intent to kill and murder, for the reason that the intent is in the alternative and is coupled with a condition, and for that reason is not a specific intent to kill, which is necessary to sustain a conviction for an assault with an intent to murder. All the authorities agree upon the general proposition that in a prosecution for an assault with intent to murder, or with intent to commit some other felony, the specific intent charged is the gist of the offense and must be proven as charged in the indictment. (*Crosby v. People*, 137 Ill. 325; *Friederich v. People*, 147 id. 310.) Upon this and like authorities where the general rule is stated, plaintiffs in error contend that the intent to commit the crime charged must be absolute and unconditional, and that if a dangerous weapon is presented in a threatening manner, accompanied with a demand upon the assaulted party and a threat to destroy his life unless such demand is complied with, the offense can not be an assault to murder. It is argued that the condition which accompanies the threat negatives the existence of that positive and specific intent which, under the law, is a necessary element in the offense charged.

No case decided by this court is cited by either party, and we are not aware that any such case exists, that is conclusive of the precise question which is raised here. In support of the view that an assault with a loaded revolver and a threat to shoot unless the party assaulted complies with a demand is not an assault with an intent to murder, plaintiffs in error rely with great confidence upon the case of *Hairstron v. State*, 54 Miss. 689. In that case Hairstron, in company with others, attempted to remove the personal effects of a laborer from the plantation of his employer, Richards, to whom said laborer was indebted on account of advances of money or provisions made to said laborer. Hairstron was in the act of hauling away the household furniture when Richards attempted to stop the wagon and took hold of Hairstron's mules, saying that he could not move the household goods until his debt was settled. Thereupon Hairstron drew a pistol and pointed it at Richards and said, "I came here to move Charles Johnson and by God I am going to do it, and I will shoot any God damned man who attempts to stop my mules," at the same time urging his mules forward as he spoke. His manner was threatening and angry and his voice loud and boisterous. Other persons who were accompanying Hairstron, some of whom were armed with guns, pressed around Richards, as if they intended to aid Hairstron if necessary. Richards was deterred by the apparent danger and released the mules and the wagon moved on. Under the above facts Hairstron was convicted of an assault with an intent to murder Richards. The conviction was reversed by the Supreme Court of Mississippi. The reasoning of the court in that case is as follows: Richards was in the act of committing a trespass upon Hairstron's property by laying his hands upon the mules and forcibly stopping Hairstron upon the public highway. Hairstron had a right to protect his property from such unlawful trespass, using no more force than was necessary. His threat to shoot was

conditioned upon a demand which he had a right to make. In disposing of the case the Supreme Court of Mississippi uses the following language: "Here there was only a conditional offer to shoot, based upon a demand which the party had a right to make. While the law will not excuse the assault actually committed in leveling the pistol within shooting distance, it cannot, from this fact alone, infer an intent to murder. The intent must be actual,—not conditional,—and especially not conditioned upon non-compliance with a proper demand." A careful analysis of that case will show that the court laid special stress on the circumstance that the threat to shoot was coupled with a demand which the prisoner had a lawful right to make.

State v. Taylor, 70 Vt. 1, *Botsch v. State*, 43 Neb. 501, *People v. Mize*, 80 Cal. 41, and *Chrisman v. State*, 54 Ark. 283, are also cited and relied on by plaintiffs in error in support of the position assumed by them upon the question under consideration. None of those cases, however, are similar in their facts to the case at bar. They are all cases supporting the general proposition that a conviction for an assault with intent to murder cannot be sustained without proof of the specific intent to take life charged in the indictment. The rule stated in those cases is well established and has been frequently announced by this court. The *Hairstron* case above referred to seems to be the only decision that lends any support to the position contended for by plaintiffs in error, and that case is clearly distinguishable from the case at bar. We think that the position of plaintiffs in error may be satisfactorily answered without repudiating the authority of the Mississippi case cited and without in any way departing from the general and well established principles laid down in the other cases relied upon. Unlawfully pointing a loaded revolver at another within shooting distance, in a threatening manner, undoubtedly, under all of the authorities, constitutes an assault. The character of the assault, whether felonious or other-

wise, depends upon the intent of the person charged. If an assault be made with a loaded revolver with an intent to kill and murder the party assailed, and the assailant is prevented from carrying out his felonious purpose by the intervention of some fact not of the assailant's own will, the offense is complete, regardless of whether the weapon is discharged or not. (*Hardy v. State*, 36 Texas Crim. 400; *Thompson v. State*, 37 id. 448; *State v. Dooley*, 121 Mo. 591.) The foregoing propositions are so well established that we do not deem it necessary to elaborate them. In the case at bar the evidence shows that plaintiffs in error, or some of them, pointed revolvers at the prosecuting witness and threatened to shoot him unless he quit work, took off his overalls and procured a card from the United Association. It will be noted that the demand made upon the prosecuting witness and others at work upon the building was one which plaintiffs in error had no lawful right to make. They might properly in a peaceful manner solicit persons to unite with their association, but they could not lawfully use force, violence or intimidation to accomplish such purpose. The demand with which the members of the International Association were required to comply under pain of being shot by plaintiffs in error and their associates was unlawful, and plaintiffs in error had no right to expect that it would be complied with. The distinction between the case at bar and the *Hairstron* case is, that in the latter the condition upon which the threat to shoot was made was lawful while in the case at bar the demand was unlawful.

In McClain's Criminal Law (section 232) the rule applicable to the case at bar is thus stated: "If the threatened injury, coupled with present ability to inflict it, is conditioned upon the party assailed refusing to do something which the assailant has no right to require him to do, it will constitute an assault even though the conditions are complied with and therefore no violence is used." The

quotation above made is supported by *Thompson v. State*, *supra*, *State v. Morgan*, 3 Ired. 186, *State v. Dooley*, *supra*, *Hardy v. State*, *supra*, *State v. Church*, 63 N. C. 15, and numerous other authorities.

' In *State v. Morgan*, above cited, the facts were as follows: Morgan was charged with an assault upon a man by the name of Cantrell. The assault grew out of a quarrel for the possession of a gun which Cantrell had. Morgan demanded the gun and Cantrell refused to give it up, whereupon Morgan stepped up within reach of him, held up an ax in a position to strike, and said, "Give up the gun or I will split you down." Cantrell did not at the time give up the gun but proposed some arrangement, upon which Morgan laid the ax down. The matter was arranged and Cantrell gave up the gun. The jury found that Morgan, at the time he went up to Cantrell and raised the ax within reach of him, intended to strike unless Cantrell gave up the gun but did not intend to strike if Cantrell gave it up. In the course of the opinion Gaston, J., used the following language: "The present case is one of a very different character. The act was not only apparently a most dangerous assault but accompanied with a present purpose to do great bodily harm, and the only declaration by which its character is attempted to be changed is, that the assailant was not determined to execute his savage purpose unconditionally and without a moment's delay. He had commenced the attack and raised the deadly weapon and was in the attitude to strike, but suspended the blow to afford the object of his vengeance an opportunity to buy his safety by compliance with the defendant's terms. To hold that such an act, under such circumstances, was not an offer of violence,—not an attempt to commit violence,—would be, we think, to outrage principle and manifest an utter want of that solicitude for the preservation of peace which characterizes our law and which should animate its administrators. To every purpose, both in fact and in law,

the attack on the prosecutor was begun, and in the pause which intervened before its consummation, most happily for both parties, an arrangement was made which prevented the probably fatal result. But this pause, though intentional and announced when the attack began, does not prevent that attack from being an offer or attempt to strike. If a ruffian were to level his rifle at a traveler and announce to him that he might have fifteen minutes to make his peace with his God, and the unfortunate man should save his life by prayers, by remonstrance, by money, or by any other means before the expiration of that time, could it be pretended that there had been no attempt nor offer to hurt him because the intent was not to kill instantaneously and therefore did not accompany the act? Will it be doubted if a bully should present his pistol at a citizen and order him, under pain of death, not to walk on the same side of the street with him, whether there was an offer of violence because the purpose to kill was not absolute, but conditional, merely? Wherever the act is done in part execution of a purpose of violence, whether that purpose be absolute or provisional makes no difference as respects the question whether the act be an assault."

The case of *Thompson v. State, supra*, was as follows: Two prisoners by the names of Hardy and Thompson made an attack upon their jailer for the purpose of escaping, one using a razor and the other a revolver. The revolver was pointed at the jailer and he was commanded to go into the cell. The revolver was not discharged. In passing on that case the Supreme Court of Texas said: "Moreover, there can be no question of the intent to kill the said McAfee [the jailer] when he drew the pistol on him and commanded him to go into the cell, if said McAfee had refused to do so. Defendant had no right to make this demand of said McAfee, and if he had refused to comply and had shot him and killed him he would have been guilty of murder, and he intended to kill or make him comply with the un-

lawful command he was guilty of an assault with intent to murder." The case of *Hardy v. State*, *supra*, was presented to the Supreme Court of Texas under a similar state of facts and the same ruling was made as in the *Thompson case*.

The rule to be deduced from these cases is correctly stated in the quotation above made from McClain's Criminal Law. An assault to murder, under this rule, may be complete where it is shown that the assailant, with the present ability to destroy life or do great bodily harm, draws a dangerous weapon on another and threatens to kill him unless the party assailed complies immediately with some unlawful condition or demand. The law will not tolerate excessive violence or intimidation for the purpose of enforcing or defending one's legal rights, and when resorted to for the purpose of carrying out an unlawful enterprise it becomes criminal, and where there is an attempt, coupled with the present ability, to commit a felony and the assailant suspends the execution of his purpose merely to give his victim a chance to comply with an unlawful demand, the offense is complete even though the commission of the felony is averted by the submission of the assailed party to the unlawful demands made upon him. In the commission of every crime there must be a union or joint operation of act and intention or criminal negligence. The act committed is ordinarily susceptible of direct proof by facts which are discernible by the natural senses. The intent or purpose exists only in the mind of the accused, and, like malice, or any feeling, emotion or mental status, is manifested by external circumstances capable of proof. By whatever means it is ascertained, the intent must be direct and specific to commit the precise offense charged. Thus, if an assault is charged with an intent to commit one felony, proof of an assault to commit another and different offense will not sustain the charge. Is an intent to commit an offense which is coupled with an unlawful condition or de-

mand, such as plaintiffs in error made upon the prosecuting witness, a direct and specific intent within the meaning of the rule of law on that subject? We think it must be so held. To hold otherwise would be to permit one guilty of violating the peace of society and the security of persons and property guaranteed to everyone, to profit by his unlawful conduct. The law will not tolerate and encourage threats of violence and death to enforce unlawful demands made upon helpless and defenseless persons by counting such acts of the perpetrator as righteousness when he is arraigned at the bar of the court where justice is administered and crime punished. In such case the unlawful character of the demand eliminates it from consideration and the act will be judged in its naked criminality, stripped of any benefit or palliation based upon the unlawful demand or condition. If an attempt is made to commit an assault and a threat is conditioned upon the party assailed performing some act which is known to be a physical impossibility, such a condition cannot possibly destroy or in any way modify the criminal character of the act. In such case the assailant, knowing the impossibility of compliance with his demand, will be held to have a specific intent to inflict the threatened harm. An impossible condition is no condition. So of an unlawful condition. No one has a right to expect or presume that anyone will submit to an illegal demand made upon him, and where, as in the case at bar, a violent assault with dangerous and deadly weapons is made upon a person in the peace of the people and a threat to destroy life is made unless the victim complies with some unlawful demand, in determining the guilt or innocence of the accused the case must be determined precisely as though the unlawful demand did not exist. Instruction No. 9 stated a correct principle of law and there was no error in giving it to the jury.

Some complaint is made by plaintiffs in error of the rulings of the court as to other instructions, which we have

considered but find nothing in connection with these rulings of sufficient importance to require discussion.

Plaintiffs in error complain of the ruling of the court in admitting evidence tending to show that three or four days before the difficulty four men came to the Hygienic ice plant, and the prosecuting witness was permitted to detail his conversation with these parties. The conversation was, in substance, as follows: The four men in question came up to where the prosecuting witness was working and asked him what he was doing there, to which he replied, "I am working." They asked, "What kind of a card have you got?" and the witness replied, "I have got an International steam-fitter's card from local No. 2." The witness was then asked by some of the party whether all of the men on that job had cards and said that they had. One of the men said, "That is all right, pal; we will get you afterwards," and they went away. The objection to this testimony is based upon the assumption that the four men who visited the plant at that time were not shown to be among those who were present at the time of the difficulty. The evidence is not very clear as to the identity of the men that were there on the first occasion, but the evidence tends to show that the four men who came to the ice plant on the first occasion were also there at the time of the difficulty. The prosecuting witness was asked whether he had seen "any of those men at the building before," to which he answered, "Yes, I saw—there was four of them came two days before, on the 18th of April; I don't know their names but I would know their faces if I saw them." He was then asked whether he saw the same men on the 20th that were there on the first occasion, to which he replied, "Yes, I saw that little dark electrician there, with Kane." We think it was entirely proper to show that anyone who was present on the day of the difficulty had visited the plant previously, and also to show what such person did or said. Whether the persons referred to by the witness as being

present on the first occasion were in the party on April 20 was a question of fact for the jury. The evidence fairly tended to show that the men with whom witness had the conversation were in the party on the day of the difficulty. There was no error in the admission of this testimony.

Plaintiff in error O'Connor interposes for himself the defense of an alibi. He testified in his own behalf that he was not present at the time of the difficulty and that he was at that time confined to his home with rheumatism. Thirteen witnesses were called and testified in support of the alibi. Of these witnesses only three, Herbert O'Connor, (a brother,) Mrs. Herbert O'Connor and Sam Craill, testified to having seen O'Connor at home in bed at or near the hour of the commission of the offense at the Hygienic ice plant. The witnesses in support of the alibi testified that O'Connor was taken suddenly and severely ill with rheumatism about the middle of March, and that he was unable to leave the house from that time until a few days after the 20th of April. Some of these witnesses testified that O'Connor was dangerously ill in the early part of April, and some of them stated that he was so ill that he could not move himself in bed and had to be assisted to do so. To meet this evidence the State produced as witnesses judges of the election in O'Connor's precinct, who testified that O'Connor voted at the city election on April 4 and again at the judicial primary on April 11, and that he appeared to be well and healthy. O'Connor was recalled to the stand, and in his second examination he admitted that he had voted on the two occasions testified to by the election officials. An affidavit which he had made in support of an application for bail was also introduced, wherein O'Connor swore that he was taken ill with articular rheumatism in December, 1910, and was compelled to stay in bed, under the care of Dr. Griffith, for a period of about six weeks. This testimony, when taken in connection with the evidence tending to identify O'Connor as one of the

party that visited the ice plant on the 20th of April, is sufficient to justify the jury in rejecting the evidence as to the alibi. It was at least a controverted question of fact for the jury to determine. The verdict of the jury upon this question is not so contrary to the evidence as to warrant us in disturbing the verdict.

We find no error in this record requiring a reversal of the judgment below. It is therefore affirmed.

Judgment affirmed.

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, vs. HERMAN SMITH, Plaintiff in Error.

Opinion filed February 23, 1912.

1. STATUTES—*when the word "may" will be construed to mean "shall."* The word "may," used in a statute, will be construed to mean "shall" or "must" whenever the rights of the public or of third persons depend upon the performance of the duty to which such word refers.

2. CRIMINAL LAW—*purpose of the Reformatory act in providing that jury shall not fix term of imprisonment.* The purpose of the Reformatory act in providing that the jury shall not fix the term of imprisonment of offenders under twenty-one years of age was to give the minor an indeterminate sentence and not to empower the judge to fix the term.

3. SAME—*Parole law has not destroyed application of Reformatory act to minors convicted of crime of rape.* The Parole law, which excepts from its provisions the crime of rape, did not, by implication, destroy the application of the Reformatory act to male offenders under the age of twenty-one years who are convicted of the crime of rape.

4. SAME—*court has no discretion in sentencing minor offender.* The fact that an offender is in the second class created by section 9 of the Reformatory act, which embraces males between the ages of sixteen and twenty-one, does not, by reason of the use of the word "may" in such section, give the court a discretion to sentence him to the penitentiary instead of to the reformatory.

5. SAME—*male under age of twenty-one convicted of crime of rape must be sentenced to reformatory.* Under the provisions of

the Reformatory act a male person between the ages of sixteen and twenty-one who is convicted of the crime of rape must be sentenced to the reformatory for an indeterminate term.

6. SAME—*prisoner over twenty-one cannot be re-sentenced to reformatory.* Where a judgment of conviction of the crime of rape is reversed for error in sentencing the prisoner to the penitentiary instead of to the reformatory, the cause cannot be remanded to the trial court with directions to re-sentence the prisoner to the reformatory, where the prisoner has become twenty-one years old while in the penitentiary and before the judgment is reversed. (*Henderson v. People*, 165 Ill. 607, distinguished.)

WRIT OF ERROR to the Criminal Court of Cook county;
the Hon. LOCKWOOD HONORE, Judge, presiding.

A. L. GETTYS, for plaintiff in error.

W. H. STEAD, Attorney General, and JOHN E. W. WAYMAN, State's Attorney, (THOMAS MARSHALL, and OTTO WADEWITZ, of counsel,) for the People.

Mr. CHIEF JUSTICE CARTER delivered the opinion of the court:

The plaintiff in error, Herman Smith, was convicted of rape, in the criminal court of Cook county, in February, 1906. The prosecuting witness was a white woman about sixty years of age and the plaintiff in error a young negro. The jury returned a verdict of guilty, finding that plaintiff in error was between the ages of ten and twenty-one years and about nineteen years old, but specifying no punishment. The trial judge sentenced him to imprisonment in the penitentiary for life, where he has since been confined.

The evidence heard on the trial has not been preserved or presented here. We cannot consider the question as to whether plaintiff in error was guilty on the affidavits presented on his behalf. They are not properly in the record. The only question for our consideration is whether the trial judge, under the law, had the right to sentence a male per-

son under twenty-one years of age, convicted of rape, to the penitentiary. Counsel for the State contend that the judge did have that right. They argue that section 10 of the Reformatory act (Hurd's Stat. 1909, p. 1815,) provides that the jury, (with exceptions not here in point,) in case the defendant is between ten and twenty-one years of age, "shall not fix the punishment of the defendant;" that the Reformatory act, while it did take away from the jury the power to fix the punishment in cases of this nature, did not take away that power from the court under section 9 of division 14 of the Criminal Code; (Hurd's Stat. 1909, p. 827;) that said Reformatory act divides persons who may be sentenced under it into two classes, viz., males between ten and sixteen years of age and males between sixteen and twenty-one; that section 11 of said act provides that a boy between ten and sixteen years of age "*shall* be committed" to the reformatory, while section 9 provides that both classes "*may* be sentenced to said reformatory;" that the conclusion is therefore reasonable that the legislature intended that the court, in cases of male persons between sixteen and twenty-one, should send them to the reformatory or the penitentiary, in its discretion; that the Criminal Code (Hurd's Stat. 1909, sec. 237, p. 798,) fixes the punishment for rape at imprisonment in the penitentiary "for a term not less than one year and may extend to life." Counsel argue that the conclusion necessarily follows that it was the duty of the judge, in this case, to fix the punishment, and he could, in his discretion, fix it in the penitentiary rather than the reformatory and also fix the term of the sentence. We cannot agree with that conclusion. Section 10 of the Reformatory act provides that in all criminal cases tried by jury, where it is found by the verdict that the defendant is between ten and twenty-one years old, the jury shall not fix the punishment, unless it shall also appear that defendant has been previously sentenced to a penitentiary or that the offense is a capital one.

The Reformatory act was passed by the General Assembly to afford a means for the reformation of youthful criminals while at the same time punishment was being inflicted for the crime committed. (*People v. State Reformatory*, 148 Ill. 413.) The Parole law was passed for somewhat the same purpose as to adults, and while the first section of that act (Hurd's Stat. 1909, p. 835,) excepts treason, murder, rape and kidnaping from its provisions, it was surely not the intention of the legislature to destroy, by implication, the application of the Reformatory act to males between the ages of ten and twenty-one, convicted of rape. The purpose of the Reformatory act in providing that the jury should not fix the sentence of minor offenders (except in certain cases) was not in order that the judge might fix the punishment, but so that the minor offender might be given an indeterminate sentence.

The word "may" in a statute will be construed to mean "shall" or "must" whenever the rights of the public or of third persons depend upon the exercise of the power to perform the duty to which it refers. (*Pierson v. People*, 204 Ill. 456; *Randolph County v. Ralls*, 18 id. 29.) The rights of the public are clearly involved in this case. In construing the Reformatory act in *Henderson v. People*, 165 Ill. 607, where it was shown that the accused was then over sixteen and under twenty-one years of age, this court stated (p. 611): "The law therefore required that he should be sentenced to the reformatory." Again, in *People v. Mallary*, 195 Ill. 582, in considering a question very similar to the one raised by the State here, as to the meaning of the word "may" this court said (p. 595): "We are referred to the case *In re Murphy*, 62 Kan. 422, as an authority in conflict with the views we have expressed. The statute there reviewed is very similar to the one here under consideration, but as we understand the law to be in that State, the advantages of the reformatory over the penitentiary are not confined to minors and the same distinctions

do not exist between the two institutions as they do in this State, and the person convicted may by the court be sentenced directly to the penitentiary instead of the reformatory,—a thing which the courts in this State cannot do.” On principle and authority, therefore, the criminal court erred in sentencing plaintiff in error to the penitentiary.

Counsel for the State further argue that if the construction that this court here gives to said statute be the proper one, then, under the reasoning of *Henderson v. People, supra*, *Neathery v. People*, 227 Ill. 110, and *People v. Coleman*, 251 id. 497, the judgment should be reversed and the cause remanded to the criminal court of Cook county, with directions to re-sentence the plaintiff in error to confinement in the State reformatory. If the plaintiff in error were now under twenty-one years of age there could be no question that under the authorities just cited this would be the proper practice. It is insisted, however, by the State, that in *Henderson v. People, supra*, the prisoner was over twenty-one years of age at the time the judgment was reversed by this court and the cause remanded for his re-sentence. Such fact does not appear from that decision. Furthermore, this question was not raised, considered or decided in that case. Manifestly, the legislature did not intend that any male person over twenty-one years at the time of his sentence should be sent to the State reformatory. While the precise question here under consideration has never been decided by this court, the reasoning in *People v. Barrett*, 202 Ill. 287, and *People v. Heider*, 225 id. 347, tends to uphold the contention of counsel for the plaintiff in error that under our present laws the court can not now sentence plaintiff in error, who is about twenty-five years of age, to the State reformatory.

The judgment of the criminal court will be reversed but the cause will not be remanded.

Judgment reversed.

C. FURNESS HATELY; Defendant in Error, vs. JOHN W. KISER, Plaintiff in Error.

Opinion filed February 23, 1912.

1. **BROKERS**—*stock broker not required to take out license under Chicago ordinance.* Section 194 of the Chicago ordinances, which defines a broker as "one who is engaged, for others, in negotiating contracts relative to property with the custody of which he has no concern," does not include stock brokers, as the certificates of stock, bonds and other securities bought and sold by a stock broker are, in a practical sense, the property dealt with, even though they are, technically, only evidence.

2. **SAME**—*giving order does not estop a customer from denying that stock was bought by broker.* The facts that a customer gave a stock broker an order to buy certain shares of stock, and that the broker thereafter reported the stock as having been bought, impose no liability upon the customer unless the stock was, in fact, bought, and do not estop him, in a suit by the broker, from insisting upon proof that the stock was bought by the broker.

3. **SAME**—*what does not prove certificates of stock were bought.* A report from a stock broker's agent to the effect that he has bought certain certificates of stock, as directed by the broker, is mere hearsay evidence where the agent is not produced as a witness; and if all the evidence tending to prove such purchase is of that character, and no witness testifies who has any personal knowledge of the transaction or has ever seen the certificates, the purchase is not proved.

4. **TRIAL**—*motion to direct a verdict—fragmentary statements not considered apart from qualifying recitals.* While the plaintiff, upon the consideration of a motion to direct a verdict for the defendant, is entitled to all reasonable inferences in his favor which may legitimately be drawn from the evidence, yet he is not entitled to have fragmentary statements considered apart from qualifying recitals.

5. **EVIDENCE**—*force of question and answer in interrogatory in municipal court.* A question and answer in an interrogatory filed by the defendant in the municipal court, to be answered by the plaintiff under oath, has no more force than the deposition or oral testimony of the plaintiff; and a statement in such answer to the effect that certain stock was kept in the possession of the plaintiff's agent, subject to plaintiff's order, cannot be accepted as proof of that fact, where the plaintiff's oral testimony shows that he had no personal knowledge of the matter but based his statement upon his agent's business reports.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on appeal from the Municipal Court of Chicago; the Hon. JOHN W. HOUSTON, Judge, presiding.

C. H. POPPENHUSEN, and JOSEPH L. McNAB, (S. S. GREGORY, of counsel,) for plaintiff in error.

IRA C. WOOD, (W. W. GURLEY, of counsel,) for defendant in error.

Mr. JUSTICE DUNN delivered the opinion of the court:

The defendant in error recovered against the plaintiff in error, in an action of assumpsit in the municipal court of Chicago, a judgment for \$5836.43, which the Appellate Court affirmed, and the record has been brought here by a writ of *certiorari* for review.

The plaintiff, who is the defendant in error here, was a stock broker in Chicago, and the suit was to recover for a loss incurred in the purchase and sale by the plaintiff, for the defendant, of two hundred shares of the capital stock of the International Mercantile Marine Steamship Company, and for brokerage fees and interest on advances. Two questions, only, in the view we take of the case, require consideration: First, whether the plaintiff, being a stock broker, was required by the city ordinance to obtain a license before engaging in that business; second, whether there was evidence of the actual purchase of the stock for the defendant by the plaintiff.

By section 192 of the city ordinances it is declared to be unlawful for any person to engage in the business or act in the capacity of a broker within the city without first obtaining a license therefor. Section 194 defines a broker as "one who is engaged, for others, in negotiating contracts relative to property with the custody of which he has no concern." That the plaintiff was a stock broker and that

he would have been required to obtain a license by section 192 of the ordinance in the absence of the definition contained in section 194, is settled by the case of *Banta v. City of Chicago*, 172 Ill. 204. That definition is in the language of Mr. Justice Walker in the case of *Braun v. City of Chicago*, 110 Ill. 186, and was sufficiently accurate for that case. One of the defendants there was doing business as a produce broker and the other as a real estate broker. A few years later the *Banta case* arose, and it was held that a person was a broker who bought and sold stocks, bonds or other securities for others for a commission, and, as such broker, might contract either in his own name or that of his principal, might receive, hold or transfer the securities which were the subject matter of the contract, and might pay or receive payment for securities bought or sold. The definition of a broker contained in the ordinance in the latter case did not differ from that in the former. After the decision in the latter case, however, the ordinance was revised and the definition limited so that the ordinance now applies only to cases where the contracts relate only to property with the custody of which the agent making the contract has no concern. While technically it may be said that the certificates of stock, bonds and other securities are only evidence and the possession of them is not the custody of the property, yet practically they stand for the property and in the usual form of speech are regarded as the property. The plaintiff was not required by the ordinance to obtain a license.

The declaration alleged, among other things, that the defendant employed the plaintiff to purchase the stock and that the plaintiff did purchase it; that it was agreed that at all times the stock should be held by the plaintiff for and on account of the defendant and subject to his order, upon the payment of the cost, with interest thereon and plaintiff's fees and charges. It was incumbent on the plaintiff to prove that he bought the stock and held it according to the

agreement. The defendant moved the court, at the proper time, to instruct the jury to find a verdict in his favor, and now argues that the court erroneously refused such instruction because there was no evidence legally tending to prove that the plaintiff bought the stock. On such a motion the plaintiff is entitled to the benefit of every presumption that can legally be drawn from the evidence in his favor, disregarding any contradictory evidence. So considered, the evidence shows that on December 5, 1905, the defendant ordered the plaintiff to buy the stock, and the defendant at once caused the order to be telegraphed to Bartlett, Frazier & Co., members of the New York Stock Exchange, to execute. Notice was received from Bartlett, Frazier & Co. of the purchase of the stock, and within ten minutes after the order was given the plaintiff notified the defendant that the purchase was made and at what prices. A written notice was mailed to the defendant. Monthly statements were sent to him and the plaintiff and defendant had frequent conversations regarding the stock, and the defendant ordered the plaintiff to sell when he could do so without loss. The plaintiff called on the defendant for \$5000 and asked for instructions as to the stock, when the defendant repudiated the whole transaction. No witness testified who, so far as the evidence shows, had ever received or seen any certificate of stock, or had any personal knowledge of any contract for the purchase of stock, or of when, where, how, with whom or for what consideration any such contract was made. If any such purchase was made it was made in New York, but no opportunity was given for the cross-examination of anyone who was within a day's journey of that city at the time. Reports, telegrams, orders and notices were offered in evidence but no witness testified as to what actually occurred at the other end of the line, and it is on what actually occurred at that end that the plaintiff's whole case rests. The defendant is subject to no estoppel. He was notified that the stock was bought for him, but he

is not liable unless it was. No burden of proof rests on him. He is under no obligation to offer anything, but the burden is on the plaintiff to make out his case by legal evidence. The latter testified that Bartlett, Frazier & Co. had bought the stock and carried it for him and kept it in their custody, but he further testified that he had no personal knowledge about it, never saw the stock and knew nothing about it except such information as he received from Bartlett, Frazier & Co. He made no claim to any knowledge, but his testimony as to the entire transaction of the purchase, carrying and sale of the stock was hearsay.

The defendant, in accordance with section 32 of the Municipal Court act, filed interrogatories to be answered by the plaintiff under oath. The ninth of these, and the answer to it, were offered in evidence by the defendant and were as follows:

"Ninth—Did you, on the 5th day of December, A. D. 1905, or at any time subsequent thereto, and if so, when, receive from anybody a certificate or certificates for two hundred shares of the preferred stock of the International Mercantile Marine Steamship Company, to hold for the said defendant? If so, from whom? What did you do with the said stock? Where was it kept prior to the said 15th day of November, 1907, and what, then, was done therewith?

Ans.—"The plaintiff did not personally hold in his possession said certificates of shares of stock. From the 5th day of December, 1905, to the 14th day of November, 1907, they were in the possession of said Bartlett, Frazier & Carrington, subject to the order of the plaintiff and for his account."

It is insisted that this answer is legal evidence tending to prove the purchase of the stock in New York. The manifest purpose of introducing it was to show that the plaintiff had never had the certificates in his possession, but the answer tended to show further that they were held

for his account in New York. On the face of this single answer, excluding all the other testimony of the witness, it appeared that the certificates were in the possession of the plaintiff's agent, subject to his order. But the evidence can not be considered in that way. While the plaintiff is entitled to all the reasonable inferences in his favor which may legitimately be drawn from the evidence, he is not entitled to have fragmentary statements considered apart from qualifying recitals. The introduction of the interrogatory and answer was unnecessary. The witness had already testified to precisely the same thing and that he had no personal knowledge whatever in regard to the matter. His testimony is conclusive on this point and there is no evidence tending to show that he had any personal knowledge. The answer added nothing to what had already been told. The interrogatory and answer were of no more force than if contained in a deposition, and a deposition would have had no more force than the oral testimony of the witness. The substance of the testimony, in whatever form produced, was that the witness had no knowledge of the purchase and holding of the stock but had received information from his agent in the ordinary course of business. This was only hearsay, which the general rule of the law rejects. Such evidence requires credence to be given to a statement made by a person who is not subjected to the ordinary tests enjoined by law for ascertaining the correctness and completeness of his testimony. Its value is further lessened by the probability that the statements testified to were imperfectly heard, were misunderstood, were not accurately remembered or have been perverted. For these reasons, as well as for reasons of public interest and convenience, the law rejects all hearsay reports of transactions, whether verbal or written, given by persons not produced as witnesses. (1 Greenleaf on Evidence, sec. 124.)

The defendant was entitled to the plaintiff's statement that he had never had possession of the certificates. The

statement which accompanied it was not in the nature of secondary evidence or evidence which might under some circumstances become competent but in view of the witness' other testimony was absolutely incompetent to prove the issue. That statement, and others of like character, were the only basis for finding that the stock had been purchased, as alleged in the declaration. The defendant's motion to direct a verdict in his favor should therefore have been sustained.

The judgments of the Appellate Court and of the municipal court are reversed and the cause is remanded for a new trial.

Reversed and remanded.

GEORGE W. ALWARD *et al.* Appellants, *vs.* E. R. HARPER, Appellee.

Opinion filed February 23, 1912.

APPEALS AND ERRORS—*decision of court upon motions must be shown by bill of exceptions.* The ruling of the trial court upon motions cannot be considered on appeal unless preserved, together with an exception thereto, in the bill of exceptions, and it is immaterial and of no legal effect that the recitals in the orders entered by the clerk show exceptions.

APPEAL from the County Court of Shelby county; the Hon. J. K. P. GRIDER, Judge, presiding.

CHAFEE & CHEW, for appellants.

W. C. & W. L. KELLEY, and S. S. CLAPPER, for appellee.

Mr. JUSTICE DUNN delivered the opinion of the court:

On May 3, 1911, the appellants, as legal voters of Penn township, in Shelby county, filed a petition in the county court to contest the election, on April 4, 1911, of E. R. Harper to the office of supervisor. A summons was issued

returnable on May 15, 1911. On May 25 the court ordered this summons quashed and a new summons issued. At the June term, to which the second summons was returnable, the court ordered it quashed and dismissed the petition after refusing to allow an amendment. The petitioners appeal, and assign for error the quashing of the two summonses, the refusal to allow an amendment and the dismissal of the petition.

The clerk has included in his record recitals that motions were made to quash each summons, to amend the petition and to dismiss the petition, and that the petitioners excepted to the action of the court on each motion and to the dismissal of the petition. What purports to be a bill of exceptions appears in the transcript, but it makes no reference to any action of the court or to any exception. It consists only of copies of five written motions and nothing else, and contains no statement that the court acted upon them in any way. It has been repeatedly held that the decision of the court upon a motion does not become a part of the record unless included in a bill of exceptions. The rule is inflexible that the action of the court on motions of this character cannot be considered on appeal unless preserved, together with an exception thereto, in a bill of exceptions. It is immaterial that the recitals in the orders entered by the clerk show exceptions. They can only become a part of the record by being incorporated in the bill of exceptions, and the clerk's recitals in that respect are of no legal effect. *Snell v. Trustees M. E. Church*, 58 Ill. 290; *Thompson v. White*, 64 id. 314; *Gould v. Howe*, 127 id. 251; *Chicago, Rock Island and Pacific Railway Co. v. Town of Calumet*, 151 id. 512; *Gaynor v. Hibernia Savings Bank*, 166 id. 577; *People v. Chicago and Northwestern Railway Co.* 200 id. 289; *Town of Scott v. Artman*, 237 id. 394.

The record presents no question on which we can pass.

Judgment affirmed.

WILLIAM L. RODISCH *et al.* Appellees, *vs.* WILLIAM H.
MOORE *et al.* Appellants.

Opinion filed February 23, 1912.

1. PARTITION—all parties whose interests will be directly affected must be made parties. In a suit for partition all persons whose interests will be directly affected by the decree must be made parties.

2. SAME—when legatee of personal property should be made a party to partition suit. The legatee of all the testator's personal property must be made a party to a suit to partition the real estate where one of the questions to be determined is whether there was an equitable conversion of certain of the real estate into personalty, in which such legatee would have an interest.

APPEAL from the Superior Court of Cook county; the Hon. CHARLES A. McDONALD, Judge, presiding.

Levi Moore died May 3, 1906, leaving a will executed on March 20, 1900. At the time of his death he was the owner of real estate and personal property. By the first paragraph of the will he directed the payment of his just debts, and by the second paragraph he devised to James Rowlett seventeen acres of land described by metes and bounds, to hold during his natural life and upon his death to go to the children of James Rowlett who survived the testator. The third paragraph of the will is as follows:

"Third—I give, devise and bequeath all the rest and residue of my estate, of whatever name and nature, however known and described and wherever situated, to Joseph K. Dunlop in trust, to take possession of the same, collect the rents, issues and profits therefrom, and within two years after my decease to sell the same, and every part thereof, and divide the proceeds thereof, one-half to my sister, Ann Mary Garrison, of Sutton Bridge, Lincolnshire, England, to be her absolute property forever; one-fourth of such residue to the children of William Moore, of said

Sutton Bridge aforesaid, and one-half to the children of Hammond Moore, of said Sutton Bridge aforesaid."

On the 21st of August, 1902, the testator executed a codicil to the will, as follows:

"MONT CLARE, ILL., *August 21, 1902.*

"I desire to add this as a codicil to my will, in which I appointed Joseph K. Dunlop my executor. The said Joseph K. Dunlop being deceased, I hereby appoint John J. Lovett, of Mont Clare, Illinois, to act instead of the aforesaid Joseph K. Dunlop as my executor.

"I give and bequeath to Susan Ann Rowlett, of Mont Clare, Illinois, wife of James Rowlett, all my personal property, of every description.

"I hereby order my executor, within one year after my decease, to expend five hundred (500) dollars for a monument and curb around my burial lot in Union Ridge cemetery, near Norwood Park, Illinois, the monument to be placed on the front of my lot."

In August, 1910, certain of the heirs-at-law of Levi Moore and a grantee of other heirs-at-law filed the bill in this case for the partition of the land owned by said Levi Moore at the time of his death, other than that devised to James Rowlett. Three tracts of land are described in the bill as having so descended to the heirs-at-law of Levi Moore. One is a tract containing ten acres, another one forty acres and another ten and eight-tenths acres, all situated in Cook county. The bill alleged that Joseph K. Dunlop, to whom the residuary estate was devised in trust and who was named as executor, predeceased the testator, and that no trustee had been appointed or any attempt made to execute said third paragraph of the will; that said paragraph contains a patent ambiguity in attempting to dispose of more than the residue of testator's estate,—five-fourths; that it would be impossible to execute the trust created by said paragraph or to determine from the will the intention of the testator, and the real estate therefore descended to his heirs as intestate estate. The bill further alleged that Ann Mary Garrison (whose correct name is said to be Ann Mary Garrad) predeceased the testator, whereby the de-

wise to her lapsed and the property devised to her descended to the heirs of the testator as intestate estate, and that equity and justice are best subserved by the total intestacy of the residuary estate. Among others, Albert F. Keeney was made a defendant to the bill. His alleged interest in the real estate sought to be partitioned accrued in the following manner: On the 16th day of September, 1904, Levi Moore gave Aaron C. Koethe, of the city of Chicago, a power of attorney authorizing him, among other things, to "make all necessary repairs on my property and sell or mortgage the same if necessary." On the 23d day of February, 1906, Koethe, as attorney in fact for Levi Moore, entered into a written contract to sell to Keeney the forty-acre tract of land for \$7000, payable May 1, 1907. The contract recites the payment of \$25 as earnest money, to be applied on the purchase price. The bill alleged that this contract of sale was invalid; that no necessity ever arose which authorized Koethe to sell the land; that Keeney had not been able, ready or willing to perform the contract on his part, and that said contract was inequitable, unconscionable, unreasonable and not authorized by the power, and that said Keeney had been guilty of *laches* in failing to assert any claim thereunder.

Charlotte Ann Rowlett, one of defendants, demurred to the bill, and as special grounds of demurrer stated complainants had not correctly set forth the respective interests of the parties to the suit and had not made necessary parties defendants. By leave of court the bill was amended with reference to the interests of the respective parties. John J. Lovett, who was named executor by the codicil and who had qualified as such upon the probate of the will, demurred to the bill as amended, and set out as one of the special grounds of demurrer that Susan Ann Rowlett, to whom all the testator's personal property was bequeathed by the codicil, was a necessary party and had not been made a party defendant. The demurrers were overruled.

Albert F. Keeney answered the bill, claiming he had a valid contract for the purchase of the forty acres; that he had paid \$25 on the purchase price, offered to pay the balance and demanded of the executor the proper deed of conveyance; that at all times since the contract was made he had been ready, willing and able to perform it on his part and is now ready, able and willing to do so. The answer denied the contract was inequitable or unreasonable and averred that \$7000 was the full value of the premises, and denied that his contract was a cloud upon the title.

John J. Lovett, the executor, in his answer admitted there was a patent ambiguity in the third paragraph of the will but denied that such ambiguity rendered it impossible to carry out the provisions of said clause, and denied that by virtue of such ambiguity the residue of the testator's estate descended to his heirs-at-law as intestate estate. The answer avers that by the third paragraph of the will there was an equitable conversion of real estate into personal property and that the devisees named therein took no interest in the land. The answer of the executor further averred that Keeney claimed an interest in the forty-acre tract of land under his contract of purchase executed subsequent to the execution of the will and codicil; that said forty-acre tract was subject to the rights of the purchaser, under his contract, at the time of the death of Levi Moore; that said contract effected an equitable conversion of said real estate into personalty, whereby Susan Ann Rowlett became entitled to the proceeds of the sale as personal property, under the will and codicil, and that it never passed to the devisees under the residuary clause of the will or to the heirs of Levi Moore as intestate estate.

This, we believe, is a sufficient reference to the pleadings to show the nature of the case and the questions presented. After replications were filed to all the answers the cause was referred to a master in chancery to take the testimony and report his conclusions. The master, after tak-

ing the testimony, reported that complainants were entitled to a decree as prayed. Objections filed by defendants to this report were overruled by the master and were renewed as exceptions upon the hearing before the chancellor. The exceptions were overruled and a decree was entered finding the third paragraph of the will void for ambiguity, finding the contract for the sale of the forty acres to Keeney to be void and a cloud upon the title, and decreeing the same to be removed and the premises partitioned as prayed.

ROBERT E. PENDARVIS, and MCEWEN, WEISSENBACH, SHRIMSKI & MELOAN, for appellants.

C. VANALEN SMITH, EASTMAN & WHITE, RALPH R. HAWXHURST, and WILLIAM GIBSON, for appellees.

Mr. JUSTICE FARMER delivered the opinion of the court:

We are of opinion this record is not in a condition to permit us to determine the rights of the parties involved in this litigation. It is insisted by appellants that the court erred in overruling the demurrers to the bill for want of necessary parties defendant, and an examination of the questions sought to be determined satisfies us that Susan Ann Rowlett was a necessary party and the superior court erred in not so holding and sustaining the demurrer to the bill. In addition to the construction of the residuary clause of the will another question adjudicated was the validity of the Keeney contract for the purchase of the forty-acre tract of land. Appellants, by the pleadings and by their brief and argument, denied the residuary clause is void, and contend that whether it is or not the Keeney contract is valid; that the devise in the residuary clause is subject to that contract, and that said contract effected an equitable conversion of the land into personalty, which would pass under the codicil as personal property to Susan Ann Rowlett. It will readily be seen that her interest was directly affected

by the determination of the validity of the Keeney contract and its effect if it should be held valid. All persons whose interests will be directly affected by the decree should be made parties. (*Howell v. Foster*, 122 Ill. 276.) "It is a well established rule in equity that all persons are to be made parties who have any legal or equitable interest in the subject matter and result of the suit." (*Bradley v. Gilbert*, 155 Ill. 154.) An exception to the rule, which is said to have grown out of convenience or necessity in the administration of justice, is what is known as the doctrine of representation, as where a person not before the court is so far represented by others that his interests receive actual and efficient protection. That rule, however, is no more applicable to a case of this character than it is to a suit to contest a will, and in *Brown v. Riggins*, 94 Ill. 560, which was a bill to contest a will, the court applied the rule that in equity all persons whose interests will be directly affected by the decree must be made parties, and held that all legatees and devisees in a will contest were necessary parties.

It must be understood that we have not considered, and therefore neither have nor express any opinion, whether the contract is valid or the effect of it if held valid. This question cannot properly be considered and determined without making Susan Ann Rowlett a party to the suit. If we were satisfied the contract was invalid, or if valid that it could not be construed to have effected a conversion of the land into personalty, or that in any event Susan Ann Rowlett is not entitled to any interest in it under the law, a judgment or decree could not be entered that would be binding upon her without making her a party to the suit.

For the error in overruling the demurrer to the bill for want of proper parties the decree is reversed and the cause remanded to the superior court, with directions to sustain the demurrer. *Reversed and remanded, with directions.*

VINCENT SOTEK *et al.* Appellees, *vs.* ANTONIA SOTEK *et al.*
Appellants.

Opinion filed February 23, 1912.

1. HOMESTEAD—*when question where widow lives is not material.* If the widow is given, in lieu of dower, the entire estate in the homestead premises until the youngest child attains majority, at which time the remainder is to go to a certain person provided he will make specified payments to the widow and others and allow the widow the use of two rooms in the house, it is immaterial where the widow lives during the minority of the youngest child or during the time when it is uncertain whether the person named to take the remainder will accept the devise subject to the conditions, as she is entitled to enjoy the premises in person or rent the same during that time.

2. SAME—*when homestead right of widow attaches.* Where a will gives the entire estate in the homestead premises to the widow until the youngest child attains majority, at which time the remainder is to go to a certain son if he will pay the widow a specified sum per month and allow her the use of two rooms in the house, but no other disposition is made of the remainder, the remainder becomes intestate estate when the person designated refuses to accept the devise, and the homestead right of the widow thereupon attaches to the property and she is entitled to such estate unless she subsequently abandons the premises.

APPEAL from the Superior Court of Cook county; the Hon. FARLIN Q. BALL, Judge, presiding.

OTTO L. STEISKAL, (LEWIS EDWARD DICKINSON, of counsel,) for appellants.

SIMON P. GARY, MICHAEL LYONS, and CASWELL & HEALY, for appellees.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The question in this case is whether Antonia Sotek, one of the appellants, has an estate of homestead in the property known as 707 Jefferson street, in the city of Chicago.

It arose on a bill for partition filed in the superior court of Cook county by appellees against appellants, and the answers thereto, claiming the estate, and it was decided against the claim. The property was improved with a two-story residence and up to March 4, 1884, was owned by Anton Sotek, the husband of said appellant, who died on that date, leaving a last will and testament. He had been twice married, and two children of the first marriage, Vincent Sotek and Anton Sotek, survived him, and, with Elizabeth Sotek, wife of the son Anton Sotek, were the complainants. He also left the appellant Antonia Sotek, his widow, and four children of his marriage with her,—Annie, Josephine, John and Jennie. It is not necessary to complicate the facts of the case with statements of the subsequent marriages, divorces and deaths which occurred among the children of the second marriage, but the widow and her children or their heirs were the defendants. By his will Anton Sotek devised to his widow, Antonia Sotek, all his real estate until the youngest child (Jennie) should have arrived at full age, in consideration of said widow taking good and proper care of and securing a proper education for their minor children and taking care of the real estate without waste, permissive or commissive, and the devise was to be in lieu of dower. When the youngest child should arrive at her majority the real estate was to be vested in the testator's son John in fee simple, on condition that he should pay to the widow at the beginning of each month, in advance, the sum of \$15 and give her the occupancy of two suitable rooms in the brick house No. 707 Jefferson street, and pay to each of the other children then living, or to the issue of any who had died leaving issue, the sum of \$500, and in case one or more of the children should die without issue, the amount that would be due was to be equally divided among the surviving children or the issue of deceased children. If John refused to accept the devise of the remainder upon the conditions imposed, or should die without

issue before the time when the remainder would vest, then the son Anton was to be substituted for him, but if John left issue surviving, then his issue was to take his place.

The premises were occupied as a homestead, and the widow, to whom an estate was given until the youngest child should reach her majority, continued to occupy them, and on August 1, 1892, she was married to Joseph Cervený, who obtained a divorce from her in 1904. She occupied the premises with her husband until about October 25, 1893, when she rented the house and moved to another house on Aberdeen street near Sixty-ninth. The defendant Antonia Sotek and her divorced husband, Joseph Cervený, were the witnesses who testified where they lived during their absence from the homestead and the length of time they were away, and it is impossible to determine from the conflicting dates given by him, and from all the testimony, the periods during which they lived in different places. During that time they lived in the house already referred to, on Aberdeen street, and in another house across the alley on the same street, and in a house in the same block on May street between Sixty-ninth and Seventieth streets, and they also lived three or four months in a house owned by Cervený, in the same neighborhood. She testified that the house was practically on the prairie, and being empty he was afraid the children would break the windows, and they moved there until it could be rented again. She did not acquire a homestead in his property, which was rented all the time except when occupied by them until it could be rented again, so that there is no question about her having two homesteads. When it was rented they moved to another place and lived there a few months until she could get possession of her homestead, when they moved into it. She had possession by tenants while they were absent, and rented the up-stairs to a Slavonian and the first floor to a saddler. She went out to work and paid the rent of the houses they occupied, except when they were in his house.

All the work he did in three years was to build a sidewalk at the place on Aberdeen street. The whole time of their absence was somewhere from two to three years. After returning to the homestead they lived there until she wearied of wedded life and turned him out of doors, about 1899, and she never left the premises. He obtained a divorce on October 31, 1904. In October, 1905, she was married to Joseph Uhler, and obtained a divorce from him on a charge of cruelty on December 20, 1907, and then resumed her name of Antonia Sotek. The bill alleged that Jennie Sotek, the youngest child, became of full age about March 1, 1896. John Sotek refused to accept the devise of the remainder upon the conditions imposed, and Anton Sotek, who was to be substituted for him, also refused it.

The will of Anton Sotek gave to his widow, the defendant Antonia Sotek, the entire estate in the premises up to the time when the youngest child, Jennie, reached her majority. It is immaterial where she lived or what she did up to that time, but she enjoyed her estate either in person or by renting the property to tenants. When Jennie became of age John Sotek had an election, under the will, whether he would take the remainder on condition that he was to pay \$15 in advance each and every month to the defendant Antonia Sotek and give her two suitable rooms in the dwelling house and make the payments to the other children. He refused to take the remainder, and Anton, who was to be substituted for him, also refused to accept it. The will made no further provision as to the remainder and it became intestate estate. If the remainder had been accepted by either John Sotek or Anton Sotek, the defendant Antonia Sotek would have received \$15 a month in advance and the right to occupy two rooms and would not have had a homestead in addition, but under the decree she neither took what the will provided for her nor what the law gave her. She could not take the provision made in the will unless John or Anton accepted the remainder sub-

ject to the conditions imposed, but when it became intestate estate the homestead right attached. The estate until Jennie became of age was in lieu of dower, but the one provision that would have been in lieu of homestead became ineffective. No question of an abandonment of a homestead could arise during the period when she had the entire estate and when it was uncertain whether the remainder would be accepted subject to the conditions in her favor. There was no evidence tending to show an abandonment of her right and estate after the refusal to accept the remainder.

The decree is reversed and the cause remanded.

Reversed and remanded.

THE COMMISSIONERS OF MOREDOCK AND IVY LANDING
DRAINAGE DISTRICT NO. 1, Appellees, vs. JOSEPH F.
MEYER *et al.* Appellants.

Opinion filed February 23, 1912.

1. DRAINAGE—*when it is error to recall condemnation jury to hear question of benefits.* Where a jury is empaneled solely to try the question of damages in a proceeding to condemn the land needed by a drainage district and is discharged from further service after returning a verdict, upon which judgment is entered, it is error, as against the objection of the land owners, to recall such jury several months later and permit it to try the questions arising on the assessment roll without permitting the land owners to examine the jurors as to their qualifications.

2. SAME—*land owners have right to participate in selection of jury.* The right of land owners in a drainage district to be present and participate in the selection of the jury to try the questions arising on the commissioners' roll of assessments cannot be denied them by requiring them to accept a jury selected for any other purpose or in any other manner than that provided by the statute.

3. SAME—*when the land owners need not show that error was harmful.* Land owners in a drainage district are deprived of a substantial right when they are compelled to accept a jury to try questions arising on the assessment roll which was not selected,

empaneled and sworn for that purpose; and it is not necessary, on appeal, that the land owners make a showing that such error was harmful to them.

4. TRIAL—*after jury is discharged it loses its identity as a jury.* After a condemnation jury has exercised its functions and has been finally discharged it loses its identity as a jury, and the court loses its jurisdiction and control over such jury, unless it may be for the purpose of recalling it to make some formal corrections in a verdict already rendered.

APPEAL from the County Court of Monroe county; the Hon. WILLIAM P. GREEN, Judge, presiding.

N. C. LYRLA, JOSHUA WILSON, and CHARLES ERD, for appellants.

A. C. BOLLINGER, and J. W. RICKERT, (WINKLEMAN & OGLE, of counsel,) for appellees.

Mr. JUSTICE VICKERS delivered the opinion of the court:

This is an appeal from the judgment of the county court of Monroe county confirming an assessment of benefits upon the lands of appellants and others in Moredock and Ivy Landing Drainage District No. 1, made for the purpose of raising the sum of \$34,000 for the purpose of paying for certain additional improvements and repairs upon those already made and to pay for right of way for the improvement. The assessment roll was filed January 19, 1911, and a notice published fixing February 28, 1911, for the purpose of having a jury empaneled in accordance with the provisions of section 6 of the Eminent Domain act, and "for a hearing before said jury upon all questions of benefits and damages to any of the lands in said district according to the statute." On the same day that the assessment roll was filed the drainage commissioners filed a petition for condemnation, praying that a jury be empaneled to assess damages for the lands sought to be condemned and taken for right of way for the proposed ditches referred to

in the petition. In the condemnation proceeding appellants filed a cross-petition, claiming damages to lands not taken. The petition for condemnation and the cross-petition are formal and no question is made in regard to those pleadings. The hearing on the assessment of benefits and damages, and also upon the condemnation proceeding, was set for February 28, 1911. On that day the condemnation proceeding was continued as to certain land owners until the 10th day of March following, and the hearing on the assessment roll was continued as to all parties until March 1, 1911. The parties to the condemnation proceeding as to whom the cause had not been continued proceeded to empanel a jury under the Eminent Domain law for the purpose of assessing damages to those land owners as to whom the condemnation proceeding had not been continued. This jury was empaneled for the sole purpose of assessing damages to the land owners upon the petition for condemnation. The condemnation jury was agreed upon and the evidence heard, and on the 11th day of March the jury returned a verdict in the condemnation proceeding in accordance with the statute, which said verdict was received and filed by the court and the duties of that jury were at an end. The condemnation jury assessed damages to appellant Meyer in the sum of \$1000 for damages to land not taken, and afterwards, on the 21st day of March, judgment was entered on the verdict of the jury and said jury was formally discharged from further service. At this time appellees were granted leave to withdraw the assessment roll from the files. Notice was again published fixing April 18, 1911, as the time when a jury would be called for the purpose of assessing benefits upon the assessment roll theretofore filed by the commissioners. In pursuance of this notice the clerk of the court drew the names of jurors, and they were duly summoned by the sheriff and appeared in court ready to discharge the duties required of them. Appellees, the drainage commissioners, then made a mo-

tion that the jury thus drawn and summoned be discharged, which said motion was, over the objections of appellants and other land owners, sustained and the jurors were sent away and an order was entered recalling the jury that had tried the condemnation case, and that jury was required to report on May 22, and the hearing upon the assessment roll was continued to that date. On May 22 the hearing on the assessment roll was continued again to June 14 because of the absence of one member of the condemnation jury, who failed to appear on account of illness. On June 14 the condemnation jurors appeared, and, the parties being in court, counsel for appellees then stated for the first time that it was the purpose to have the condemnation jury pass on the assessment roll. Numerous objections were made by appellants to proceeding before this jury, among others that said jury had not been selected for any purpose except to assess damages to the land owners whose lands were taken or damaged by the proposed ditches, and that when that duty was performed said jury was discharged from further service and sent away, without any instructions or intimation that the jurors would be called back for the purpose of passing on the assessment roll, and that there was no authority of law for the court to recall the jury and require appellants to submit the questions arising under the assessment roll to said jury. All of appellants' objections were overruled, and the court ordered the jurors to be re-sworn without any examination or any opportunity for examination as to their qualifications. This appeal is from a judgment confirming an assessment based upon the verdict of a jury thus selected. The action of the court in requiring appellants to proceed to an assessment of benefits before the jury thus provided is the only assignment of error that requires our consideration.

Prior to the amendment of the Levee act, in 1909, the hearing of objections to the assessment roll was before the commissioners, under the supervision of the county court.

By the revision of 1909 of the Levee act sections 17a and 17b were added, which make provision for a hearing before a jury upon the commissioners' roll of assessment of benefits and damages, which jury is to be selected in accordance with the provisions of section 6 of the Eminent Domain law. The statute provides that upon the hearing upon the assessment roll the commissioners and all persons interested in the lands to be affected "shall have the same right of challenge of jurors as in other civil cases in the county courts of this State." The statute also provides that said jury shall be sworn to "faithfully and impartially perform the duties required of them to the best of their understanding and judgment and to make their assessments of benefits or of damages, or damages and benefits, as the case may be, according to law." It would seem to be too plain for argument that the land owners could not be compelled to submit all questions in relation to the assessment of benefits and damages to a jury that had not been selected and empaneled for any such purpose. The right of the land owners to be present and participate in the selection of the jury to try and determine such questions as may be presented in relation to the assessment cannot be denied them by requiring them to accept a jury selected for any other purpose or in any other manner than that provided for by the statute. After the jury in question had discharged its functions in the condemnation case and had been finally discharged it lost its identity as a jury and the court lost its jurisdiction and control over that jury, unless it might be for the purpose of recalling it to make some formal corrections in respect to the verdict already rendered. In the proceeding here under review the county court seems to have regarded the condemnation jury as a permanent and continuing jury over which the court had control, and which was subject to be called in to discharge other duties in connection with the assessment of damages and benefits. We do not hold that where there are damages to be assessed

for right of way and also benefits and damages under the assessment roll it would be error to call a jury and submit all questions to the same jury, but if such practice is permissible under the statute it could not be followed unless at the time the jury was selected and accepted by the parties it was understood that both branches of the investigation were to be submitted to the jury. The nature and scope of the questions to be submitted to the jury may have an important bearing upon the exercise of the right of peremptory challenges of jurors. In *Vandalia Levee and Drainage District v. Vandalia Railroad Co.* 247 Ill. 114, this court held that the rules prescribed for the organization of a common law jury applied to the selection of a jury under the Drainage law, and it was there held that a jury selected and empaneled to spread one assessment could not be called back for the purpose of spreading a second assessment, even though the latter was ordered before the former had been spread.

We think that appellants were deprived of a substantial right in being required to submit the objections to the assessment roll to a jury that was not selected, empaneled and sworn for that purpose. In the brief and on the oral argument of this cause appellees answer that this error is not shown to be harmful to appellants. We think this record presents a case where injury must be presumed to result from an error of this character. Appellants would have no means of showing, if they were required to do so, that a jury selected in the proper manner would have rendered a verdict more favorable than the one rendered by the irregular jury. It is enough to warrant a reversal that appellants have been deprived, by the rulings of the court below, of a substantial right guaranteed to them by the law.

The judgment is reversed and the cause remanded.

Reversed and remanded.

W. E. NEIBERGER, Appellant, vs. J. S. McCULLOUGH,
Auditor, et al. Appellees.

Opinion filed February 23, 1912.

1. CONSTITUTIONAL LAW—*question of the existence of a law is a judicial one.* No bill can become a law except in the mode prescribed by the constitution, and the power and duty to decide whether a bill has become a law reside in the courts.

2. SAME—*constitution is a grant of general legislative power.* The Federal constitution is a grant of legislative power over enumerated subjects, but the Illinois constitution is a grant of general legislative power to the General Assembly, to be exercised conformably to its provisions.

3. SAME—*constitution is the measure of the powers granted to the different departments of government.* The constitution of Illinois expresses the will of the people in their sovereign capacity and is the measure of the powers committed to the legislative, executive and judicial departments, each of which, in its appointed sphere, exercises that portion of the sovereignty delegated to it.

4. SAME—*when a contemporaneous construction will be disregarded.* Where a constitutional provision is doubtful and there is need of interpretation, the practical exposition of it by departments of government called upon to act under it, acquiesced in by the people for a considerable period of time, raises the presumption that such practical exposition is correct and it will generally be adopted by the courts; but if a constitutional provision is not doubtful, a construction contrary to its terms, for any period of time, will be disregarded.

5. SAME—*journal of either house is competent to show that an act was not passed.* In Illinois it is competent to show by the journal of either branch of the General Assembly that an act was not passed in the mode prescribed by the constitution.

6. SAME—*facts required to be set forth in journal must appear there.* The steps in the passage of a bill which are required to be entered in the journal of each house must affirmatively appear by the journal to have been taken or the conclusion is that they were not taken, and it cannot be presumed, from the mere silence of the journal, that they were taken. (*Supervisors of Schuyler County v. People*, 25 Ill. 181, disapproved.)

7. SAME—*taking of vote is not the only step required to be entered on the journal.* The express provision of the constitution for the entry of the ayes and noes on the journal on the final pas-

sage of a bill does not carry with it the implication that the other steps in the passage of the bill need not be entered therein.

8. *SAME—the journal must show that bill, and all amendments thereto, were printed.* The requirement of the constitution that a bill, and all amendments thereto, shall be printed before a vote is taken on its final passage is one which the journal must show was complied with; and such provision applies to amendments made by either house after the passage of a bill by the other or to amendments made by a conference committee.

CARTER, C. J., and DUNN, J., dissenting.

APPEAL from the Circuit Court of Sangamon county;
the Hon. JAMES A. CREIGHTON, Judge, presiding.

ASHCRAFT & ASHCRAFT, and GILLESPIE & FITZGERALD,
(EDWIN M. ASHCRAFT, of counsel,) for appellant.

W. H. STEAD, Attorney General, THOMAS E. DEMPCY,
and CHARLES E. WOODWARD, for appellees.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The circuit court of Sangamon county sustained the demurrer of the Auditor of Public Accounts, the State Treasurer and the Board of Trustees of the University of Illinois, appellees, to the bill of W. E. Neiberger, a taxpayer of McLean county, appellant, which asked the court to enjoin the Auditor from issuing his warrant for the amounts mentioned in sections 2 and 6 of the act entitled "An act making appropriations for the maintenance and extension of the various departments of the University of Illinois," (Laws of 1911, p. 39,) and enjoining the Treasurer from paying such warrant and the board of trustees from receiving said amounts.

The bill alleged, and the demurrer admitted, the following facts: The journals of the house of representatives and senate showed that a bill was introduced in the house and passed containing section 2, appropriating \$100,000

per annum for the maintenance and extension of the college of medicine of the university, and section 6, appropriating \$60,000 annually for the agricultural experiment station; that the bill was reported to the senate and referred to the committee on appropriations, which reported it back with ten amendments, one of which struck out section 2 entirely; that section 6 remained as it passed the house, and the bill as amended passed the senate in that form; that the house refused to concur in the amendments, and a conference committee was appointed which reported recommending that the house concur in certain amendments and section 2 be restored but appropriating only \$60,000, and that section 6 be amended by striking out \$60,000 and inserting in lieu thereof \$65,000, and that in both house and senate the question was submitted, "Shall the report of the conference committee be adopted?" and it was decided in the affirmative on an aye and nay vote entered in the journals. It did not appear from the journals that either of the amendments reported by the conference committee was ever printed, and they did not show any vote on the passage of the bill as amended, other than as above stated.

The general question submitted is whether a bill becomes a law where the journals of the house and senate do not show a compliance with the requirements of the constitution respecting the passage of bills, and the question in this particular case is whether the bill became a law although it did not appear from the journal of either house that it was printed with its amendments, in its final form, before its passage. The Attorney General, not conceding that his admissions are decisive of the controversy, admits by his brief and argument, and admitted in the argument at the bar, that the constitutional provisions with reference to the passage of bills are mandatory; that it is competent to go behind the printed statute and enrolled act and show by the journal of either branch of the General Assembly that the

act was not passed in the mode prescribed by the constitution; that the journals must show on their face a compliance with every requirement of the constitution, from the introduction of a bill until its final passage, or it will not become a law, and that the silence of the journals as to any required step is evidence of its non-existence. The admissions of the Attorney General as to these questions of law are conclusive in this case and we might well omit further reference to them, but as they are of public importance and may affect the validity of other laws, it is deemed best to re-state the decisions of this court to some extent and the grounds upon which they rested.

Courts have differed as to whether it is competent to show by the journals of the legislature that a bill which has been enrolled, authenticated and deposited with the Secretary of State was not passed in compliance with the provisions of the constitution, and there have also been different views as to presumptions when the journals are admitted as evidence. A very full and accurate summary of the decisions on the subject will be found in the note to *Palatine Ins. Co. v. Northern Pacific Railway Co.* 9 Ann. Cas. 579. In the Supreme Court of the United States, and in a number of the States, the rule prevails that the journals cannot be used as evidence for the purpose of impeaching the act. Frequently the English rule respecting acts of parliament is referred to, and various courts holding the same doctrine have based their decisions on the grounds that the requirement for keeping a journal is to furnish information to the public and not to provide evidence of legislative proceedings; that the signatures of the presiding officers and of the Governor constitute a conclusive finding that the act has been passed in conformity to the constitution; that public policy requires that the validity of acts so signed and enrolled shall not be questioned, and that the journals of legislatures are so badly kept that they ought not to be relied upon as evidence of what was done or not done. None

of these reasons have prevailed in this court, and in *Field v. Clark*, 143 U. S. 649, where the Supreme Court of the United States established its rule, it was stated that the rule is different in this State. The rule in England, where there is no written constitution, could not influence the question, and holding that public policy does not require citizens to know the contents of legislative journals is not exactly consistent with the proposition that the journals are intended to provide information for the public. We have no provision that the Governor shall inquire into the proceedings of the General Assembly or learn from other sources of information than the journals that a bill was read, printed or passed. The only duty enjoined upon him is that when a bill shall be presented to him he shall approve it or return it with his objections. Courts have been quite indulgent as to the manner of keeping records with minor local boards or official bodies, which are necessarily chosen from the inexperienced and unskilled in such matters, but if the records of a body selected to make laws are to be looked upon with the same lenity, the courts have not gone so far as to presume that things were done which can not be inferred from the record to have been done.

The question involved first came before this court in *Spangler v. Jacoby*, 14 Ill. 297, which was decided in 1853, and the court there established two rules: First, that it was competent to show by the journal of either branch of the General Assembly that an act was not passed in the mode prescribed by the constitution; and second, that if facts were not set forth in the journals the conclusion was that they did not transpire. The case was decided under the constitution of 1848, and section 21 of article 3 contained this provision: "And on the final passage of all bills the vote shall be by ayes and noes, and shall be entered on the journal." Section 23 provided that every bill should be read on three different days in each house, unless the rule was dispensed with. The validity of an act was dis-

puted on the ground that the journal of the house did not show that the bill had been read the third time or the ayes and noes called on its passage. The court said that it was clearly competent to show by the journals of either branch of the legislature that a particular act was not passed in the mode prescribed by the constitution and thus defeat its operation altogether; that the constitution required each house to keep a journal, and declared that certain facts made essential to the passage of the law should be stated therein; that the journal was made up under the immediate direction of the house and was presumed to contain a full and complete history of its proceedings, and that if those facts were not set forth the conclusion was that they did not transpire.

In *Turley v. County of Logan*, 17 Ill. 151, an act for the removal of a county seat was questioned on the ground that it had not been read three several days nor such readings dispensed with, as required by the constitution. The court said that the provision of our constitution could no more be disregarded than any other provision in it restrictive of legislative power, but the act was held valid because the journals had been amended so as to show the readings.

In *Prescott v. Board of Trustees of Illinois and Michigan Canal*, 19 Ill. 324, it was again held that the court would look behind the printed statute to the journal to ascertain whether an act had a legal existence, and that a section of the public act which the journal showed was stricken out in the house formed no part of the bill, and the remainder of the bill had no vitality as the journal did not show that when amended it received the constitutional action of the senate.

In *Supervisors of Schuyler County v. People*, 25 Ill. 181, it was objected that the senate journal did not show that a bill was read three times. The court said, that while the constitution contained the requirement it did not say that the readings should be entered on the journal, and held

that where the constitution was silent as to whether a particular act to be performed should be so entered, it was left to the discretion of either house to enter it or not, and the court would presume that it was done unless the journal affirmatively showed the contrary. The decision was upon two grounds: First, that the requirement was merely directory, and might be complied with or not, at the discretion of either house; and second, that it would be presumed that the act was done unless the journal affirmatively showed that it was not. The first proposition has never found favor in any other case in this court, and the second is not in accord with the earlier or later decisions. The case was referred to in *Wabash Railway Co. v. Hughes and Selz*, 38 Ill. 174, but the same question was not involved in the later case. In that case the Governor had returned to the senate a bill with his veto, and the question in dispute was whether the Governor had retained the bill longer than permitted by the constitution after its presentation to him. Bills were presented to the Governor through a member of the enrolling or engrossing committee of the house finally passing the bill or by the enrolling or engrossing clerk, and it was an act to be performed after the passage of the bill. The provision was not in the article relating to the legislative department but in the article concerning the executive, and the time when he received the bill and how long he retained it was necessarily to be determined by his records or evidence. It was held that everything which the constitution required to be entered upon the journals in the progress of the bill through the two houses was essential to its binding force and must appear from the journals themselves to have been performed, but other acts required to be done but not required to be spread upon the journals would be presumed to have been done unless the contrary appeared from the journals themselves. As the presentation to the Governor was after the final passage of the bill it was not a step taken in its

passage through the General Assembly, and it would be the height of absurdity to say that if the journal did not show that a bill was presented to the Governor at all, there would not only be a presumption that it was presented, but also of the time when the act was done. What the court decided was, that it was not necessary to enter in the journal an act of a clerk or member of a committee after a bill had been regularly passed. The decision in that case was interpreted in *Chicago Telephone Co. v. Northwestern Telephone Co.* 199 Ill. 324, as meaning that where the journal is silent as to whether any requirement of the constitution in the passage of a bill has been complied with the silence of the journal is accepted as evidence of non-compliance, but where the constitution does not require a fact to be recorded and it can be inferred from the recital upon the journal that the fact existed or the step was taken, then the presumption will be that the fact did exist or the step was taken in order to sustain the validity of the law, where the contrary does not appear from the journal itself.

In *People v. Starne*, 35 Ill. 121, the general Appropriation act, providing for the ordinary and contingent expenses of the government, was held not to be a law because it did not appear from the journal of the house to have been read or that any vote was taken upon either reading or passage, and the court cited and quoted from many cases holding that doctrine.

In *Ryan v. Lynch*, 68 Ill. 160, a certificate of the Secretary of State purporting to give full and true copies of the journals of the senate and house relating to the passage of a bill was in evidence and did not show that the bill was read three times on three different days nor passed on a vote of the ayes and noes, as required by the constitution, and the court said that the bill never became a law and was as completely a nullity as if it had been the act or declaration of an unauthorized assemblage of individuals.

In *Larrison v. Peoria, Atlanta and Decatur Railroad Co.* 77 Ill. 11, an attempt was made to show that there were two bills pending of the same number; that one was regularly introduced, twice read and referred to a committee, but that a member of the committee reported back another bill of the same number, which was read but once before its passage. The court held that if there were two bills the act was void, but that there was not the slightest doubt that there was but one bill and that the constitution was satisfied.

In *Burritt v. Commissioners of State Contracts*, 120 Ill. 322, the court, reciting the provisions for reading the bill three times and printing it, and the other requirements of the present constitution, said that these various provisions giving the form and mode by which valid and binding laws are enacted are in the highest sense mandatory.

In *Illinois Central Railroad Co. v. People*, 143 Ill. 434, the court declared it to be a settled law of this State that the journal of either branch of the General Assembly may be resorted to for the purpose of overcoming the *prima facie* evidence furnished by the signatures of the speakers and the approval of the Governor.

In *People v. Knopf*, 198 Ill. 340, the court again stated the rule that if the facts essential to the passage of a law are not set forth in the journal the conclusion is that they did not transpire, and if the journal fails to show that an act was passed in the mode prescribed by the constitution the act must fail.

In *People v. Bowman*, 247 Ill. 276, the court reiterated the statement that the journals of the senate and house must show on their face a compliance with every requirement of the constitution, from the introduction of a bill until its final passage, or it will not become a law, and that the silence of the journals as to anything required to be shown is evidence of its non-existence. That is the last expression of the court as to the law, and the cases of

Spangler v. Jacoby, *People v. Starne* and *Ryan v. Lynch* were cited and endorsed. The court there said: "If the journal fails to show anything which, if it had occurred, should have appeared on the journal, the failure to show it is evidence that it did not occur." In *Spangler v. Jacoby* the court said that the journal of each house is presumed to contain a full and complete history of its proceedings, and as the journal does not show the printing of the bill the presumption is that it did not occur. The only departure from that rule was in *Supervisors of Schuylcr County v. People*, which was never afterward followed but was overruled in numerous subsequent decisions.

We do not regard the express provision for the entry of the ayes and noes on the final passage of the bill as carrying with it the slightest implication that other matters need not be entered. The constitution of 1818 provided that each house should keep a journal of its proceedings and publish the same, and that the ayes and noes of the members on any question should at the desire of any two of them be entered in the journal. That was a privilege given to members which could have had no object except to fix responsibility for votes. The constitution of 1848 contained the same provision for the entry of the ayes and noes on any question at the desire of two members, but made it compulsory that on the final passage of all bills the vote should be by ayes and noes and should be entered on the journal. The provision was included in the present constitution for the same evident purpose of fixing the responsibility of members of the General Assembly and compelling them to go on record when voting for or against bills.

The provision for printing bills was introduced in the present constitution as a new requirement, and is, that a bill, and all amendments thereto, shall be printed before the vote is taken on its final passage. When proposed in the constitutional convention it caused much debate, and its

object is made plain by the views of those who advocated it and which caused its adoption. It was advocated by Mr. Allen, Mr. Tincher, Mr. Church and Mr. Medill, and their reasons were, that the General Assembly could not act understandingly upon any bill until it was printed; that the provision would prevent advantage being taken of members and they would know upon what they were voting; that it would prevent amendments which could be seen in manuscript, only, and at the clerk's desk, and that a bill, after all amendments had been made, ought to be printed and laid upon the members' tables so that they might examine it. Mr. Tincher said that the reason for the provision was obvious and that there was not a single provision in the legislative report more important than that one, and Mr. Medill recalled an act which illustrated the danger of not having amendments printed. In the address to the people submitting the constitution for adoption the convention said: "To afford security against hasty and vicious legislation we have required all bills and amendments thereto to be printed before they are passed." The convention regarded the requirement as very important, and, as we think, with good reason.

A question as to the existence of a law is a judicial one, and it is for the courts to determine whether there is such a law or not. (*Duncan v. McCall*, 139 U. S. 449.) It is often said that the constitution is a limitation upon the power of the General Assembly; and that is true in the sense that the constitution grants general legislative authority to the General Assembly, which is only restrained or limited by the provisions and limitations contained in the instrument. While the Federal constitution is a grant of legislative power over enumerated subjects, our constitution is a grant of general legislative power to the General Assembly, to be exercised conformably to its provisions. Without the constitution, with its provisions for the two houses, for the number of members, the division into dis-

tricts, the election of members and the grant of legislative authority there could be neither General Assembly nor legislation by such a body. The constitution expresses the will of the people in their original and sovereign capacity and is the measure of the powers committed to different departments. The sovereignty remains with the people, and the legislative, executive and judicial departments, each in its appointed sphere, exercises that portion of the sovereignty delegated to it. Each department must exercise such delegated powers in the mode and by the means prescribed by the constitution, and any act by either not conformable to its provisions will be void. No bill can become a law except in the mode prescribed by the constitution, and the power and duty to decide whether a bill has become a law reside in the courts.

The propositions contended for by the Attorney General are, that although the requirements of the constitution are mandatory, the practical construction of such requirements by the legislative department should prevail; that as a matter of fact the General Assembly has construed the constitution ever since its adoption, in 1870, as not requiring the printing of amendments adopted by conference committees, and that, regardless of the weight to be given to legislative construction, the construction as adopted is correct. It is true that where a constitutional provision is doubtful and there is need of interpretation, the practical exposition of it by departments of government called upon to act under it, acquiesced in by the people, especially for a considerable period of time, raises a strong presumption that it is correct and will generally be adopted by the courts. (*Nye v. Foreman*, 215 Ill. 285; *People v. Olson*, 245 id. 288; *Cook County v. Healy*, 222 id. 310.) Where, however, the language of the constitution is not ambiguous it is not permissible to interpret it differently from its plain meaning, and a construction contrary to its terms, for any

period of time, will be disregarded. In this case there is not the slightest ambiguity in the provision that a bill, and all amendments to it, shall be printed before it is put upon its final passage. No words or form of expression could make the provision more plain, and it can make no difference if the fact is, as asserted, that it has been disregarded by General Assemblies which were charged with the duty to comply with it.

It is contended that the legislative construction is correct on the ground that the final passage of a bill referred to means its passage in the house or senate, regardless of amendments to it subsequently made. The argument is, that when a bill is introduced, read three times, printed, and put upon its passage in either house, the constitution is complied with, although it may be subsequently amended in the other house or by a conference committee, and be afterward passed in a different form and with different provisions. The words, in their natural and ordinary meaning, refer to the last act of the house or senate in passing a bill and enacting it in a law, and there are obvious reasons for rejecting the argument. The final passage of a bill cannot mean one thing where the vote is required to be by yeas and nays, (which is the language of the present constitution,) and a different thing where it is required to be printed before the vote is taken on the final passage, and if the interpretation contended for is correct, the provision for the yeas and nays on the final passage of the bill would apply only to the first passage, and not to the passage of the bill as it becomes a law. If that were so, a bill changed and amended by the report of a conference committee might become a law by the vote of the majority of a quorum, and, of course, that idea could not be entertained for a moment.

The decree is reversed and the cause is remanded to the circuit court, with directions to overrule the demurrer.

Reversed and remanded, with directions.

Mr. CHIEF JUSTICE CARTER, dissenting:

Assuming that the admissions of the Attorney General in his brief and argument must be regarded as controlling the decision of this particular case, yet the majority opinion goes beyond this particular case and lays down a rule for the government of other cases with which I cannot agree. I concur in that portion of the opinion which holds that amendments proposed by conference committees are required to be printed the same as other amendments, but I do not believe that under the constitution and the decisions of this court, if the journals fail to state that the report of the conference committee was printed, the court must conclude that it was not printed before the final vote was taken.

As stated in the majority opinion, there is a great diversity of judicial holdings as to whether the legislative journals may be looked into for the purpose of impeaching the validity of an enactment which is valid on its face. In many jurisdictions it has been held that when a bill has been properly engrossed, enrolled and filed with the Secretary of State it is not competent to show by the journal of either house of the legislature that such act was not regularly passed in the form in which enrolled. This has always been the holding by the English courts, but as that country has no written constitution such holdings are not even persuasive in this case. In a large number of jurisdictions, including Illinois, the courts have held that an enrolled bill is only *prima facie* evidence that it has passed the legislature, and if it is alleged that the legislature has failed to comply substantially with any constitutional requirement in the passage of the bill the journals may be introduced to support such contention. (See authorities in note to *Palatine Ins. Co. v. Northern Pacific Railway Co.* 9 Ann. Cas. 579.) The United States courts have held that such an enrolled act cannot be impeached by resort to the journal, and the State courts are about equally divided on the question. (1 Lewis' Sutherland on Stat.

Const.—2d ed.—sec. 44.) The current of judicial decisions during recent years (undoubtedly owing to the decision of the Federal Supreme Court in *Field v. Clark*, 143 U. S. 649,) has been against the right of the courts to go back of the enrolled act to impeach it by the journal.

Sections 12 and 13 of article 4 of the constitution read, so far as here relevant:

“Sec. 12. Bills may originate in either house, but may be altered, amended or rejected by the other; and on the final passage of all bills, the vote shall be by yeas and nays, upon each bill separately, and shall be entered upon the journal.

“Sec. 13. Every bill shall be read at large on three different days, in each house; and the bill and all amendments thereto shall be printed before the vote is taken on its final passage.”

In addition to these provisions the following must be kept in mind from section 10 of article 4 of the constitution: “Each house shall keep a journal of its proceedings, which shall be published. In the senate at the request of two members, and in the house at the request of five members, the yeas and nays shall be taken on any question, and entered upon the journal. Any two members of either house shall have liberty to dissent * * * and have the reasons of their dissent entered upon the journals.”

The practice is for each house in a legislative body to keep a journal of its legislative proceedings, of which the courts take judicial notice. “If it should appear from these journals that any act did not receive the requisite majority, or that in respect to it the legislature did not follow any requirement of the constitution, or that in any other respect the act was not constitutionally adopted, the courts may act upon this evidence and adjudge the statute void. But whenever it is acting in the apparent performance of legal functions, every reasonable presumption is to be made in favor of the action of a legislative body. It will not be

presumed in any case, from the mere silence of the journals, that either house has exceeded its authority or disregarded a constitutional requirement in the passage of legislative acts unless where the constitution has expressly required the journals to show the action taken, as, for instance, where it requires the yeas and nays to be entered." (Cooley's Const. Lim.—7th ed.—193-195.) The rule on this question so laid down by this learned author is supported by the great weight of authority. Where the particulars of compliance with the constitution are not specifically required to be entered on the journals such compliance will be presumed, in the absence of express proof to the contrary. The silence of the journals will not be accepted as proof that a proceeding required and not found recorded was omitted, but if the constitution requires a certain proceeding in the process of legislation to be entered on the journals such an entry is necessary to the validity of the act. It must then affirmatively appear by the journals that such constitutional requirement has been complied with. Lewis' Sutherland on Stat. Const. (2d ed.) secs. 51-53; Black on Const. Law, (1895) sec. 106; 26 Am. & Eng. Ency. of Law, (2d ed.) 541, and cases cited; 36 Cyc. 957, and cases cited.

It is held by the majority opinion that this court has not followed the rule as thus laid down, but has decided that each requirement of the constitution as to the enactment of laws would be presumed not to have been followed if the journals did not affirmatively show that it had been. The earliest case bearing on this question in this court was *Spangler v. Jacoby*, 14 Ill. 297. It was stated there: "It is clearly competent to show from the journals of either branch of the legislature that a particular act was not passed in a mode prescribed by the constitution, and thus defeat its operation altogether. The constitution requires each house to keep a journal, and declares that certain facts made essential to the passage of a law shall be stated there-

in. If those facts are not set forth the conclusion is that they did not transpire." It will be noted that this case refers to matters which the constitution then, as now, declared shall be recorded in the journal,—in that case the passage by yeas and nays.

In *Turley v. County of Logan*, 17 Ill. 151, the opinion, among other things; states: "The journals should show the readings and the passage of the law by a constitutional vote." The language thus used was not necessary for the decision, and the court sustained the act upon the ground that the same legislature subsequently amended the journal to show (as correctly shown by the original minutes of the clerk) that the bill had been read three times.

In *Schuyler County v. People*, 25 Ill. 163, it was objected that the senate journal did not show that the act was read three times in that body before it was put upon its final passage. The court said: "The constitution does require that every bill shall be read three times, * * * but the constitution does not say that these several readings shall be entered on the journals. Some acts performed in the passage of laws are required by the constitution to be entered on the journals in order to make them valid, and among these are the entries of the ayes and noes on the final passage of every bill, and we held in the case of *Spangler v. Jacoby* that where the journal did not so show this the act never became a law. But where the constitution is silent as to whether a particular act which is required to be performed shall be entered on the journals it is then left to the discretion of either house to enter it or not, and the silence of the journal on the subject ought not to be held to afford evidence that the act was not done. In such a case we must presume it was done, unless the journal affirmatively shows that it was not done." This holding conforms in all respects to the general rule as laid down by Cooley, Sutherland, Black and other authorities heretofore cited.

It is held by the majority opinion that the case of *Schuyler County v. People, supra*, is not in accord with the other decisions of this court. With this holding I can not agree. In *People v. Starne*, 35 Ill. 121, it was held that as the house journal did not show that the bill in question was ever put upon its passage or that the yeas and nays were called and spread upon the journal the act was invalid. The court said (p. 136): "According to the theory of our legislation, when a bill has become a law there must be record evidence of every material requirement, from its introduction until it becomes a law. And this evidence is found upon the journals of the two houses." This and other statements in the opinion fairly support the contention that all the mandatory provisions of the constitution should be shown affirmatively by the journals. It seems clear, however, that the court did not intend to overrule *Schuyler County v. People, supra*, for in commenting on that case it said (p. 142): "It is there held that although the journals failed to show that the bill was read three several times in each house, the constitution not requiring that fact to be recorded the law would not for that reason be invalid. But it was there said, in accordance with the rule in the case of *Spangler v. Jacoby*, that under the constitution it was requisite to the validity of an act that the ayes and noes should appear upon the journals." Moreover, the judge who wrote the opinion in the *Starne* case afterward wrote the opinion in *Wabash Railway Co. v. Hughes*, 38 Ill. 174, where, in discussing whether it was essential that the journals should show the time when the bill was presented to the Governor, the court said (p. 186): "Some acts must appear from the journals to have been performed, as well as the proper authentication upon the bill, before it can be regarded as a law of the land. Everything which the constitution has required to be entered upon the journals in the progress of a bill through the two houses is essential to its binding force and must

appear from the journals to have been performed. Other acts required to be done by the two houses but not required to be spread upon the journals will be presumed to have been done when a statute appears in other respects to be regular, unless the contrary appears from the journals themselves. (*Schuyler County v. People*, 25 Ill. 163.) Such was the rule adopted in that case and we see no reason for departing from it." This rule of law as laid down in *Wabash Railway Co. v. Hughes*, *supra*, has been approved several times, (*Burritt v. Commissioners of State Contracts*, 120 Ill. 322; *Chicago Telephone Co. v. Northwestern Telephone Co.* 199 id. 324; *People v. McCullough*, 210 id. 488;) and has never before been directly questioned by any decision in this court.

In *People v. DeWolf*, 62 Ill. 253, and *Ryan v. Lynch*, 68 id. 160, the questions involved were as to the final passage of the bills there considered. Just after these decisions had been handed down by this court, the Federal court for the Illinois circuit, (the late Justice Harlan presiding and writing the opinion,) in the Lake Front case, (*State of Illinois v. Illinois Central Railroad Co.* 33 Fed. Rep. 730,) discussed the question whether, if the journal was silent as to the second reading of a bill, that fact would, under our constitution and the decisions theretofore rendered by this court, justify the holding that the law was invalid. After reviewing all the authorities from this State Justice Harlan said (p. 763): "We do not find that any of the numerous decisions of the State court relating to the passage of bills by the legislature have modified or overruled the doctrine announced in *Supervisors of Schuyler County v. People*. With that doctrine we are entirely satisfied. It is in harmony with the adjudications in many of the States whose constitutions have provisions similar to those in the constitution of Illinois which we have been considering. (Citing authorities.) We therefore hold that the mere silence of the senate journal as to whether the act of 1869

was read the second time in that body does not justify us in holding it to be invalid."

It is true that in *People v. Knopf*, 198 Ill. 340, and *People v. Bowman*, 247 id. 276, statements are made which might be construed as upholding the doctrine laid down in the majority opinion, but in neither of those cases were the statements necessary to the decision of the questions there involved. Neither of those decisions refers to *Schuyler County v. People*, *supra*, or *Wabash Railway Co. v. Hughes*, *supra*, nor to any of the other cases heretofore cited as sanctioning the rule laid down in the case last referred to. In the *Knopf* case it was proved that the bill never passed both houses in the form in which it was signed and approved and filed with the Secretary of State. As the vote on the final passage must be shown on the journals, necessarily the journals could be looked to to see whether the bill became a law. The only point decided in the *Bowman* case had reference to the recording of the yeas and nays on the final passage. Neither of those cases, in my judgment, holds that the steps which the constitution requires to be taken in the passage of bills but does not expressly state must appear in the journal, such as printing the amendments, must so appear.

Under the conclusions reached in the opinion of the court all steps required by the constitution in passing a law must be entered on the journal of each house of the legislature, otherwise the act will be void. This construction of the constitution leaves, it seems to me, without any force or meaning the requirement that the yea and nay vote must be entered upon the journal of each house. The fact that these and other like provisions are inserted, requiring that certain things should be entered at length upon the journals, seems to demonstrate that the members of the convention who drafted the constitution intended that such requirements must be shown on the journals, otherwise the laws would be void, but that laws would not be held void if

other provisions of the constitution not required in specific terms to be entered on the journals were not so entered. If it were intended that all the steps in passing a law must be shown by the journals or the law would be void, why did not the members of the constitutional convention so provide? That the constitution requires certain proceedings of the legislature to be set out in the journals but does not require certain other proceedings to be so set out, proves that the constitutional convention intended to make a distinction between those proceedings that are necessary and those that are not necessary to be shown on the journals.

The printing of amendments to bills not being required by the constitution to be set out on the journals of the legislature, by a fair construction of the constitution and the great weight of authority the courts, in my judgment, ought not to presume, by the mere silence of the journals as to such printing, that the legislature failed to comply in that regard with its duties under the constitution.

Mr. JUSTICE DUNN: I concur in the views expressed by Mr. Chief Justice Carter in the foregoing dissenting opinion.

THE PEOPLE *ex rel.* A. H. Eminger *et al.* Appellants, vs.
THE SANGAMON AND DRUMMER DRAINAGE DISTRICT,
Appellee.

Opinion filed February 23, 1912.

1. JURISDICTION—*jurisdiction of the subject matter cannot be conferred by consent of parties.* A judgment rendered without jurisdiction of the subject matter, even by the consent of the parties, is void and may be disregarded.

2. DRAINAGE—*under section 58 of the Levee act a proceeding to annex lands must be in court where the district was organized.* Section 58 of the Levee act contemplates but two proceedings for the annexation of lands,—one before a justice of the peace and the other in the county court where the district was organized,—

and does not authorize a proceeding in another county court even though the land annexed lies in such county.

3. SAME—*fact that district may be sued in either county where land lies does not affect jurisdiction under section 58.* The fact that a drainage district embracing lands lying in two counties may be sued in either county has nothing to do with the special jurisdiction of a proceeding to annex lands under section 58 of the Levee act. (*Mason and Tazewell Drainage District v. Griffin*, 134 Ill. 330, distinguished.)

4. SAME—*what is not a proper replication in quo warranto.* In a *quo warranto* proceeding against the commissioners of a drainage district embracing lands in two counties, the questions whether any work has been done or the plans have been changed to the injury of the land owners are not good grounds for a replication to a plea setting up the organization of the district and the order of annexation of the lands of the relators.

APPEAL, from the Circuit Court of Ford county; the Hon. T. M. HARRIS, Judge, presiding.

A. L. PHILLIPS, M. H. CLOUD, and F. M. THOMPSON, for appellants.

RAY & DOBBINS, and L. A. CRANSTON, for appellee.

Mr. JUSTICE DUNN delivered the opinion of the court:

The Sangamon and Drummer Drainage District, comprising lands in the counties of Champaign and Ford, was organized under the Levee act in the county court of Champaign county, in which county the greater part of the land was situated. Subsequently the commissioners of the drainage district filed their complaint in the county court of Ford county, praying that certain lands in Ford county contiguous to the district should be annexed to it. After a hearing, in which the land owners all participated, their objections were overruled and an order was entered annexing the land to the district. An information in the nature of a *quo warranto* having been filed in the circuit court of Ford county on the relation of the land owners, requiring

the drainage commissioners to show by what warrant they exercise jurisdiction over the lands in Ford county so purporting to have been annexed to the district, the respondents pleaded the proceedings in the county court of Ford county and the order of annexation. Two replications were filed to this plea: First, that the drainage district was organized in the county court of Champaign county and not of Ford county, wherefore the county court of Ford county had no jurisdiction to make the order annexing the lands; second, that neither at the time of filing the complaint for the annexation of the relator's lands, nor since, had any work been done by the district or any ditch been constructed, but that the plans of the work had since the alleged annexation been changed by order of the county court of Champaign county and the proposed ditch so reduced in size and capacity that it will be of no benefit to the land of the relators. A demurrer was sustained to these replications, judgment was rendered against the relators, and they have appealed.

The first and most important question presented is, did the county court of Ford county have jurisdiction to make the order of annexation? The answer depends upon the construction of sections 4 and 58 of the act under which the district was organized. Section 2 provides for the filing of the petition for the organization of the district in the county where the greater part of the lands to be affected shall lie. Section 4 provides that the county court in which the petition shall be filed may hear it at any term, and may determine all matters pertaining thereto and all subsequent proceedings of the district when organized. The words, "and all subsequent proceedings of the district when organized under this act," were not in the section as the act was originally passed, in 1879, but were added in the revised act passed in 1885. Neither did the act of 1879 provide for the annexation of territory not included within the

original district. Section 58, which makes such provision, was added in 1885. As since amended it is as follows:

"Sec. 58. Any land lying outside of the drainage district as organized, the owner or owners of which shall thereafter make connection with the main ditch or drain or with any ditch or drain within the district as organized or whose lands are or will be benefited by the work of such district, shall be deemed to have made voluntary application to be included in such drainage district; and thereupon the commissioners shall make complaint in writing, setting forth a description of such land or lands, benefited, and amount of benefits; the name of the owner or owners thereof, also, a description of the drain or ditch making connection with the ditches of such district, as near as may be; and file said complaint in the county court or before a justice of the peace. The court or justice of the peace shall fix a day, not less than fifteen days from such filing, when he will hear such complaint, and thereupon the commissioners shall give ten days' notice thereof in writing; said notice shall embrace a copy of such complaint, and service thereof shall be by reading or delivering a copy thereof to such owner or owners, or by either publishing a copy of said petition or posting copies thereof within the territory sought to be annexed in the same manner as provided by section 3 of said act; and affidavit of such service shall be evidence thereof. At the time fixed, or at a time continued from such time fixed, the court or justice of the peace, shall hear said cause, and if the complaint is before a justice of the peace, and judgment is rendered in favor of said district, he shall record a copy of said complaint, and service of notice thereof together with his judgment thereon upon his docket, and if the district was organized before the county court, he shall transmit a certified copy of such complaint and judgment to the clerk of such court who shall file and record the same, or if the complaint was heard by the county court, in which such district

was organized and judgment given in favor of said district, a record of such judgment giving a description of such lands annexed shall be made, and such lands described in the complaint in either case, shall be deemed a part of such district and shall be assessed as other lands therein. The assessments of benefits against such lands so added to said district, may be made at any time the commissioners may deem proper; and the assessment roll thereof shall be filed and recorded and proceedings thereon had as in other cases; or such lands may be assessed when all lands throughout the district are assessed."

This section does not expressly state in what county the proceedings authorized by it shall be had, and the language does not leave it altogether free from doubt as to which county is meant. It is evident, however, that a record was intended to be kept in the court in which the district was organized, as well of all land annexed to the district as of the original boundaries, for the section provides for the transmission to the clerk of such court of a certified copy of the complaint and judgment when the proceedings shall have been had before a justice of the peace, and for the filing and recording of such copy. It also directs that if the complaint shall have been heard by the county court in which the district was organized and judgment given in favor of the district, a record of the judgment, giving a description of the lands annexed, shall be made, and such lands described in the complaint, in either case, shall be deemed a part of such district. No provision is made for the transmitting or recording of a certified copy of the judgment of a county court of a county in which the annexed lands are situated but in which the district was not organized. From this omission, and from the use of the words "in either case," in connection with the words in section 4 conferring on the county court in which the district shall have been organized, jurisdiction of all proceedings of the district subsequent to the organization, the

conclusion seems reasonably to follow that the legislature did not contemplate proceedings under section 58 in any other county court than that in which the district was organized, and that two cases, only, were within the intention of the legislature: proceedings before a justice of the peace, and those in the county court in which the district was organized.

This objection goes to the jurisdiction of the subject matter by the county court of Ford county. The appearance of the land owners in that court could not authorize it to proceed, for jurisdiction of the subject matter cannot be given by consent. A judgment rendered without jurisdiction of the subject matter, even by consent of the parties, is void and may be disregarded.

The case of *Mason and Tazewell Drainage District v. Griffin*, 134 Ill. 330, is cited as sustaining the jurisdiction of the Ford county court, but it is not in point. It was held there that a drainage district extending into two counties has a corporate existence in each county and is subject to the jurisdiction of the courts of either. But the fact that the district may be sued in the courts of either county has nothing to do with the special statutory jurisdiction conferred by section 58.

The second replication was bad. If the doing of work by the district was of any importance, the matter was only proper for consideration on the application for annexation by the court having jurisdiction of that subject matter. If the change of plan injured the land owners, that was a question to be submitted to the county court of Champaign county. Neither of those questions can be considered in a case of this character.

The judgment will be reversed and the cause remanded to the circuit court, with directions to overrule the demurrer to the first replication.

Reversed and remanded, with directions.

MARIANNA V. REED *et al.* Appellees, vs. CHARLES WELBORN, Appellant.

Opinion filed February 23, 1912.

1. WILLS—*courts prefer construction which gives estate of inheritance to first donee.* Courts will so construe a will, if possible, as to give an estate of inheritance to the first donee, and it will be presumed that the testator intended by his will to dispose of all his estate and leave no intestate property.

2. SAME—*under the statute, words of inheritance are not necessary to create a fee.* Under the statute it is not now necessary in Illinois, as it was at common law, to use words of inheritance to create a fee, and the statute gives a fee unless contrary appears.

3. SAME—*devise to testator's daughter "and her children" held to create a fee in the daughter.* A devise of real estate to the testator's wife for life and at her death to the testator's daughter "and her children," and if the wife outlives the daughter and the latter "shall have no children" then the property to descend to the testator's next of kin upon the wife's death, is intended to create a life estate in the wife with remainder in fee to the daughter and her children as tenants in common, if she had a child or children at the time of the testator's death, but to give the daughter the fee, subject to the life estate of the wife, if the daughter had no child at the testator's death. (*Davis v. Ripley*, 194 Ill. 399, followed.)

APPEAL from the Circuit Court of Henderson county; the Hon. R. J. GRIER, Judge, presiding.

O'HARRA, O'HARRA, WOOD & WALKER, and CHARLES A. JAMES, for appellant.

SAFFORD & GRAHAM, for appellees.

Mr. JUSTICE HAND delivered the opinion of the court:

This was a bill in chancery filed in the circuit court of Henderson county by Marianna V. Reed and George M. Reed, her husband, against Charles Welborn, to enforce the specific performance of a contract for the sale of the east half of the south-east quarter of section 12, in township 8, north, range 4, west of the fifth principal meridian, in

the county of Henderson and State of Illinois, whereby Charles Welborn agreed to purchase said premises from Marianna V. Reed for the sum of \$14,500. An answer and replication were filed and a decree was entered in accordance with the prayer of the bill, and Charles Welborn has prosecuted an appeal to this court to reverse said decree.

Marianna V. Reed derived title to said premises by virtue of the provisions of her father's will, which, so far as it affects the title to said land, reads as follows: "I give * * * to my wife, Jane A. Voorhees, * * * all of the east half of the south-east quarter of section twelve (12), in township eight (8), north, range four (4), west of the fifth principal meridian, in the county of Henderson and State of Illinois, * * * and it is my wish that she remain in full possession of said premises * * * during her life * * * and at her death to go to my only child, Marianna Voorhees, and her children, and further provide that if my wife, Jane A. Voorhees, shall outlive my daughter, Marianna, and Marianna shall have no children, then at the death of my wife, Jane A. Voorhees, to descend to my next nearest of kin." The will was admitted to probate. Jane A. Voorhees died prior to the date of the contract and Marianna Voorhees married George M. Reed subsequent to the date of the will, and at the time the bill was filed Marianna V. Reed had no children. It was stipulated on the trial that the sole question to be determined by the court was, did the absolute title to said premises vest in Marianna V. Reed upon the death of her father, subject to the life estate of her mother, Jane A. Voorhees? It was the contention of the appellees that upon the probate of the will of Abram S. Voorhees and death of Jane A. Voorhees the title to said premises in fee vested in Marianna V. Reed, who had no child or children at the time of her father's death; while it was contended by appellant that Marianna V. Reed took only a life estate in said premises, and the fee would vest in her child or children should a child or

children be born to her either prior to or subsequent to the death of her father, or that upon the birth of a child or children to her at any time, Marianna V. Reed and said child or children, upon the death of Jane A. Voorhees, would become seized in fee, as tenants in common, of said premises, and that for the purposes of this case it could make no difference whether Marianna V. Reed was seized of a life estate or in fee of a part of said premises, as in either event, it is urged, she was not in a position to convey in fee simple said premises to Charles Welborn, hence she was not entitled to a decree for the specific performance of the said contract as against Charles Welborn. The chancellor adopted the view of the appellees, and a decree was entered on the theory that Marianna V. Reed was the owner of the premises in fee simple.

The law is well settled in this State that the courts will so construe a will, if possible, as to give an estate of inheritance to the first donee; (*Leiter v. Sheppard*, 85 Ill. 242; *Giles v. Anslow*, 128 id. 187; *McFarland v. McFarland*, 177 id. 208;) that it will be presumed that a testator intends by his will to dispose of all his estate and leave no intestate property; (*Higgins v. Dwen*, 100 Ill. 554; *Hayward v. Loper*, 147 id. 41; *Biggerstaff v. VanPelt*, 207 id. 611;) and that it is not now necessary in this State to use words of inheritance, as was the case at common law, to create a fee, but the statute gives the largest estate,—that is, a fee,—unless the contrary appears. (*Davis v. Ripley*, 194 Ill. 399; *Boehm v. Baldwin*, 221 id. 59.) We think it plain, in view of these well settled rules of construction, it must be held that Abram S. Voorhees intended to give his widow, Jane A. Voorhees, the use of said premises during her natural life,—that is, to create in her a life estate,—and to give the fee to his daughter, Marianna, and her children, if she survived her mother and had a child or children;—that is, he intended his daughter and her child or children should have the remainder as tenants in common

if she had a child or children, but if she did not have a child or children she should take the entire estate in fee, subject to a life estate in her mother, and that in case Marianna should not survive her mother and should die childless the estate should go to his next of kin, and as the daughter survived her mother but was childless at the death of her father, she took, by virtue of the terms of her father's will, the fee title to the said premises and was in a position to convey a fee to Charles Welborn, and was therefore entitled to have said contract of sale specifically performed.

The case of *Davis v. Ripley*, *supra*, is, in principle, on all-fours with this case. There the testator gave to his two daughters and their children all his real and personal estate, and at the time the litigation was commenced (which was a bill for the appointment of a trustee) neither of the daughters had a child or children, and the court in a well considered opinion held that the fee to the testator's real estate vested in his daughters on the death of the testator, and no children having been born to them, or either of them, prior to the death of their father, the will became inoperative as to their children and the fee vested in the daughters.

In *Boehm v. Baldwin*, *supra*, the testator devised certain real estate to his son and his children. The son died childless, and in a suit for the partition of the land which had been devised to the son, the court, in the course of the opinion, states the question to be decided thus: "The question to be determined is whether the estate of Elias V. Baldwin was reduced to a life estate by the fact that he had no children to take the estate jointly with him, as tenants in common, when the estate vested and that none were born subsequently." The court then proceeds to answer the question which it had propounded, as follows: "The intention manifested by the will was to give the land in fee simple to Elias V. Baldwin, but in the event that he should

have children by his wife they should be tenants in common in fee with him, and unless the devise must be controlled by our statute, which turns a fee tail into a life estate in the devisee with remainder in fee to the person or persons to whom the estate tail would on the death of the devisee first pass, Elias V. Baldwin must be held to have been the owner in fee simple." The court then refers to the *Davis case*, and says: "In the case of *Davis v. Ripley*, 194 Ill. 399, where there was a devise to the two daughters of the testatrix and their children, we considered the question whether the rule in *Wild's case*, 6 Coke, 17, was applicable to the devise in view of our statute which gives a fee unless the contrary appears, and whether there is now anything upon which that rule can operate. The rule was intended to enlarge the estate by construction and not to cut it down, and we concluded that the rule cannot be applied under our statute, which now gives the largest estate possible. It was held that the will devised a fee simple under our statute, and as it took effect on the death of the testatrix, the fee simple title vested in the devisees at that time, and no children having been born to them, the will became inoperative as to their children. We are satisfied with the correctness of that decision, and it must control in this case."

We are of the opinion that on the death of the testator, Marianna V. Reed having no children, the premises in question vested in fee in her, subject to the life estate of her mother, and that, her mother having died before the contract was executed, Marianna V. Reed held the fee title to said premises, and that the trial court did not err in entering a decree for the specific performance of said contract.

The decree of the circuit court will be affirmed.

Decree affirmed.

GEORGE L. KIMBER, Appellee, vs. HARVEY M. BURNS,
Appellant.

Opinion filed February 23, 1912.

1. TRESPASS—*when party is guilty of trespass.* One who cuts down trees the stumps of which stand partly upon his lot and partly upon the lot of another person, who had forbidden the cutting, is guilty of trespass, even though he cut down the trees in order to move to his lot a house which stood upon the other person's lot and which the latter had sold to the former with the understanding that it would be moved off the lot in some other direction not requiring the cutting of the trees, the purchaser at that time not owning the adjoining lot.

2. NEW TRIAL—*what necessary to justify granting new trial for newly discovered evidence.* To justify granting a new trial upon the ground of newly discovered evidence the evidence must be of a conclusive nature, and it must appear that there was no lack of diligence to discover the evidence before the trial was had.

APPEAL from the Circuit Court of Morgan county; the
HON. OWEN P. THOMPSON, Judge, presiding.

W. N. HAIRGROVE, and M. T. LAYMAN, for appellant.

KIRBY, WILSON & BALDWIN, for appellee.

Mr. JUSTICE FARMER delivered the opinion of the court:

This is an action for trespass to real estate. The declaration charges that the defendant broke and entered the close of plaintiff described as lot 9, block 21, in the city of Waverly, and cut and destroyed two soft maple shade trees then growing thereon; also charges him with removing a pump from plaintiff's well, tearing up and destroying the platform of the well, tearing up and destroying the cement brick wall at the top of said well, and removing from said well a cooling box and destroying the same. Defendant pleaded not guilty and that the close was the close of defendant. Issues were joined on the pleas, a trial had before a jury and a verdict rendered in favor of plaintiff for

\$100, upon which the court, after overruling a motion for a new trial, rendered judgment. Defendant prosecuted an appeal to the Appellate Court for the Third District, and that court transferred the case to this court on the ground that a freehold was involved.

Appellee was for some time prior to the alleged trespass the owner of lot 9, in block 21, upon which there was a house. Appellant purchased from appellee the house on lot 9 and was given verbal permission to move it off the lot. He afterwards purchased from a Miss Graves lot 10, which joins lot 9 on the west, and made preparation to move the house from where it stood, west to and upon lot 10. Two maple trees and a well were between the house and the place on lot 10 where appellant proposed to move it, and moving in that direction necessitated moving it over the well and cutting down the trees. This appellee forbade appellant doing. He, however, cut the trees down, removed the pump and platform of the well, the wall above the surface of the ground, and took out a cooling box that was in the well.

Two surveyors who had a short time before the trial surveyed the line between lots 9 and 10, testified the well was wholly on lot 9 and the two trees were on the line. Seven and one-half inches of the stump of one of the trees was on lot 9 and twenty-two inches on lot 10. Eight inches of the other stump was on lot 9 and twenty-two inches on lot 10. Appellant did not claim that appellee ever gave him permission to move the house west over the well and where the two trees stood. He testified when he bought the house of appellee they had a talk about what part of the lot he should take it over in moving it; that he told appellee he had in view different places to which he thought of moving the house; that two of the places he had in mind were south-west of lot 9 and another north-east; that if he took it west they talked about going out south, and if he moved it north they talked about pulling it out east; that at an-

other time they talked about moving it off the lot south between two trees, but appellant said he did not think there was space enough between them to do that. Appellee testified their agreement was that the house was to be moved off the lot south-east, and that he stated he would not permit the trees on the west of the house to be cut. Appellant testified to making measurements with a tape line which showed the trees to be wholly on lot 10, but there was no reliable testimony contradicting the correctness of the line located by the surveyors. While there was some conflict in some of the evidence upon unimportant matters, the undisputed material testimony shows that the acts of the appellant complained of were unlawful.

Complaint is made that certain remarks of the court during the progress of the trial and in the presence of the jury were prejudicial to appellant. We have read the remarks complained of in the record and think the objection made is without merit.

Complaint is also made of the rulings of the court in giving certain instructions on behalf of appellee and in refusing the thirty-fourth instruction asked by the appellant. We have examined the instructions and are of opinion there was no substantial error in the action of the court in giving or refusing instructions.

In support of his motion for a new trial appellant filed an affidavit that he was surprised by the testimony of one of the surveyors, and had since discovered that the survey and blue-print made by the surveyor and offered in evidence were incorrect, and that he could prove by several witnesses that one of the trees cut down was entirely on his lot. He also filed an affidavit of a surveyor that he had run the line between lots 9 and 10 since the trial and that the stump of one of the trees was wholly on lot 10. If such affidavits would entitle a defeated party to a new trial it would be in the power of such party in almost any case to secure a new trial. The affidavit stated no facts that

appellant could not have known, by reasonable diligence, before the trial. A new trial will sometimes be granted on account of newly discovered evidence, but it must appear that there was no lack of diligence used to discover the evidence before the trial and the newly discovered evidence must be of a conclusive nature. The affidavit of the appellant wholly fails to comply with these requirements.

The motion for a new trial was properly overruled and no valid reason has been shown why the judgment rendered on the verdict should be reversed. It is therefore affirmed.

Judgment affirmed.

THE CITY OF SPRINGFIELD, Appellee, vs. THE POSTAL
TELEGRAPH-CABLE COMPANY, Appellant.

Opinion filed February 23, 1912.

1. MUNICIPAL CORPORATIONS—*provisions of special charter not in conflict with general law remain in force.* Upon the adoption, by a city organized under a special charter, of the general Cities and Villages act, provisions of the special charter not in conflict with such act remain in force.

2. SAME—*powers of municipal corporations are not unlimited.* Municipal corporations are limited to powers granted in express words or those necessarily implied in or incident to the powers expressly granted, and those essential, and not merely convenient, to the declared objects and purposes of such corporations.

3. SAME—*legislative sanction is essential to the use of streets by telegraph or telephone companies.* Legislative sanction directly given or conferred through municipal action is necessary in order to authorize the use of streets for the poles and wires of telegraph or telephone companies.

4. SAME—*act of Congress concerning telegraph companies does not preclude a city from requiring compensation for use of streets.* Municipal corporations having legislative authority may demand reasonable compensation for the space in the streets exclusively appropriated by the poles of telegraph and telephone companies, without conflicting with the act of Congress of 1866, as amended in 1884, with reference to telegraph companies using public highways and streets.

5. *SAME*—city may fix reasonable compensation for the use of streets. In Illinois a city owning the fee has power, under the Cities and Villages act, to allow any use of its streets not inconsistent with the public objects for which they are held, and may regulate such use and fix a reasonable compensation for the same, including the use for the poles of telegraph or telephone companies.

6. *SAME*—a city may charge reasonable rental for portions of streets occupied by poles. A city having control of streets and highways within its territorial limits may impose upon telegraph or telephone companies using the streets by permission or license, and not under an irrevocable grant, a reasonable charge, in the nature of a rental, for the use of parts of the streets exclusively occupied by poles.

7. *SAME*—when compensation for use of streets is in nature of a rental. A provision of an ordinance requiring any person, firm or corporation owning, controlling or occupying any post or pole over eight feet high located in any street, alley or sidewalk, and used to support electric or other wires or signs or awnings, to pay the city, annually, one dollar per pole as remuneration for the portion of the street occupied, is a provision for a charge in the nature of a rental and not for a license fee or tax, even though the word "license" appears in the title of the ordinance.

8. *SAME*—person attacking provision for compensation has burden of showing it to be unreasonable. A provision in an ordinance fixing the sum of one dollar per pole to be paid, annually, to the city as remuneration to the city for the use of the portion of the street occupied exclusively by such pole is *prima facie* reasonable, and the burden of proving it to be unreasonable is upon the party asserting such fact.

WRIT OF ERROR to the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Sangamon county; the Hon. ROBERT B. SHIRLEY, Judge, presiding.

BROWN, WHEELER, BROWN & HAY, and JOHN T. CREIGHTON, (WILLIAM N. COOK, and WILLIAM E. O'NEIL, of counsel,) for appellant:

The city of Springfield had no express power to pass the ordinance here relied upon. The express powers of a municipal corporation are those, and those only, that are conferred upon it by the legislature, as evidenced by its

charter. Dillon on Mun. Corp. (4th ed.) sec. 89; *Huesing v. Rock Island*, 128 Ill. 465.

No express power is given appellee by the Cities and Villages act, or any prior act not in conflict therewith, to impose a license upon telegraph companies for the use of the surface of its streets and alleys, to let and collect rent for such use and occupation by telegraph companies, or to levy a special tax upon telegraph poles situated thereon. Hurd's Stat. 1909, chap. 24; Pub. and Priv. Laws of 1854, (Extra Sess.) 35; *State Freight Tax case*, 15 Wall. 232.

There is no power necessarily implied in or incidental to any of the express powers given under, nor any that is indispensable to the declared purposes of a city incorporated under, the Cities and Villages act which will authorize the passage of the ordinance relied upon.

A municipal corporation has no authority to impose or collect a license for the carrying on of any particular business unless express warrant therefor is found in its charter. *Wisconsin Tel. Co. v. Milwaukee*, 126 Wis. 1; *Wisconsin Tel. Co. v. Oshkosh*, 62 id. 32; *Cambridge v. Water Co.* 99 Md. 501; *Chicago v. Insurance Co.* 126 Ill. 276.

Any fees or charges imposed under the general police power must be based upon and may be collected for the purpose, only, of defraying the expense of reasonable inspection, regulation and supervision. The fees must be reasonable in amount, the expenses of supervision being the limit of the charge. 4 Cook on Corp. (6th ed.) sec. 938; *Saginaw v. Swift E. E. Co.* 113 Mich. 660; *Delaware and Atlantic Tel. Co.'s Petition*, 73 Atl. Rep. (Pa.) 175; *Telegraph Co. v. Philadelphia*, 190 U. S. 160.

A telegraph company, acting under authority of the Post Roads act, (act of Congress approved July 24, 1866, amended March 1, 1884,) may lawfully enter with and maintain its necessary equipment upon the public streets and alleys of a city without first obtaining a license or per-

mit so to do. In so entering with and maintaining such equipment a telegraph company does not become a trespasser. Hurd's Stat. chap. 24, sec. 62; chap. 134; Rev. Stat. of U. S. 5263-5269; 23 U. S. Stat. at Large, 3; *Telegraph Co. v. Visalia*, 149 Cal 744; *Punxsutauney v. Telegraph Co.* 18 Pa. Dist. 308; *Telegraph Co. v. Lakin*, 53 Wash. 326; *St. Louis v. Telegraph Co.* 63 Fed. Rep. 68; 148 U. S. 92; *Pensacola Tel. Co. v. Telegraph Co.* 96 U. S. 8.

FRANK L. HATCH, and ALBERT STEVENS, (TIMOTHY McGRATH, of counsel,) for appellee:

Appellee has express warrant to collect remuneration for the occupancy of portions of its streets and alleys by the poles of appellant. Hurd's Stat. chap. 24, art. 5, sec. 1; chap. 134, sec. 4; *Huesing v. Rock Island*, 128 Ill. 465; *St. Louis v. Telegraph Co.* 148 U. S. 92; 149 id. 465; *Telegraph-Cable Co. v. Baltimore*, 156 id. 210; *Telegraph Co. v. Railroad Co.* 195 id. 540; *Memphis v. Telegraph-Cable Co.* 145 Fed. Rep. 602; *Telegraph-Cable Co. v. Baltimore*, 79 Md. 502.

Where the city owns the fee in a street its power to allow any use thereof and to regulate such use and fix a reasonable compensation therefor is subject to no limitation except such use shall be reasonable. *Quincy v. Bull*, 106 Ill. 337.

In this State a city may, under the power of exclusive control of its streets, allow any use of them which is not inconsistent with the public objects for which they are held. It is equally well settled that the city may regulate such use and fix a reasonable compensation to be paid for the same. *Sears v. Chicago*, 247 Ill. 204.

The city may exact "a license fee for the use of the street." *Byrne v. Railway Co.* 169 Ill. 75; *People v. Railroad Co.* 178 id. 594; *People v. Telephone Co.* 245 id. 121.

We deny appellant's claim that a telegraph company may lawfully enter and maintain its necessary equipment upon the public streets and alleys of a city without first obtaining a license or permit to do so, and maintain, on the contrary, that in Illinois authority is conferred on its corporations by the legislature, and that appellant got its license or permit to enter on the streets and highways of Illinois when it received its charter from the State, and not till then, provided, however, it obtained the consent in writing (unless waived) of the corporate authorities or accepted the Post Roads act, the latter of which appellant did, and we further maintain that appellant not only owes obedience to the laws of the State of Illinois but the laws of every State which it enters. Hurd's Stat. chap. 134, sec. 4; *Telegraph Co v. Attorney General*, 125 U. S. 530; *Telegraph Co. v. Missouri*, 190 id. 420; *Telegraph Co. v. Wright*, 166 Fed. Rep. 954.

All ordinances within the delegated powers of a municipal corporation are presumed to be reasonable and valid, and the burden is upon one attacking such ordinances to clearly establish their unreasonableness. *Berry v. Chicago*, 192 Ill. 156; *Standard Oil Co. v. Danville*, 199 id. 50.

Mr. CHIEF JUSTICE CARTER delivered the opinion of the court:

This was an action in debt brought in the circuit court of Sangamon county by the appellee, against the appellant, in which it was alleged that said company occupied certain portions of the streets and alleys in the city of Springfield during the years 1906, 1907, 1908 and 1909 without paying into the city treasury, on the first day of September of each year, one dollar for each pole over eight feet high used by said company, as required by a certain ordinance of said city. Appellant filed the general issue and gave notice of certain special matters relied on for defense under

acts of Congress of 1866 and 1884 with reference to the right of telegraph companies to construct, maintain and operate lines of telegraph over post roads, public roads and highways. On a hearing the jury returned a directed verdict in favor of appellee for \$640. From judgment entered thereon an appeal was prayed to the Appellate Court, where the judgment was affirmed. The Appellate Court granted a certificate of importance to this court.

The appellant company was incorporated under the laws of Illinois in 1905 for the purpose of carrying on the business of transmitting telegraphic messages. It accepted the Post Roads act of Congress of 1866, as amended in 1884. January 3, 1898, the city council of Springfield adopted an ordinance which amended its code with reference to licenses, providing, among other things, that before any person or corporation should engage in business within the limits of said city he or it should first obtain a license. One of the sections of that ordinance reads as follows: "Any person, firm or corporation owning, controlling or occupying any post or pole over eight feet high which may occupy any portion of any street, alley or sidewalk within the city of Springfield, such post or pole being used to support electric or other wires, of whatsoever nature, or to support any sign or awning or display for the purpose of advertising, shall pay annually into the city treasury the sum of one dollar for each pole or post owned, controlled or occupied by said person, firm or corporation, as a remuneration to the said city for the use of the portion or portions of the street, alley or sidewalk which said pole or post may occupy." It appears that from its incorporation until this suit was instituted the appellant company occupied the streets and alleys of the city of Springfield with 160 poles carrying wires, without any demand for the payment of one dollar per year for each pole and without having paid anything into the city treasury during all of such time, as required by said ordinance.

Paragraph 6 of section 4 of article 5 of an act to incorporate the city of Springfield provided that the city council had "the exclusive control" of the "streets, alleys and highways of the city, and to * * * regulate * * * the same," etc. (Pub. and Priv. Laws, Second Sess. 1854, p. 44.) The present Cities and Villages act was adopted by the city of Springfield. Clause 9 of section 1 of article 5 of that act provides that the city council shall have the power "to regulate the use of the" streets, and clause 17 of the same section that the city council shall have power "to regulate and prevent the use of streets, sidewalks and public grounds for * * * telegraph poles," etc. (Hurd's Stat. 1909, p. 343.) The provisions of the special charter, so far as they are not in conflict with the general Cities and Villages act, are still applicable to the city of Springfield. (Hurd's Stat. 1909, chap. 24, sec. 6, p. 334; *City of Cairo v. Bross*, 101 Ill. 475; *Board of Water Comrs. v. People*, 137 id. 660.) Section 4 of chapter 134 of our statutes provides that no telegraph company shall erect any poles within any city, town or village without the consent of the corporate authorities. (Hurd's Stat. 1909, p. 2212.)

Counsel for appellant insist that the city of Springfield was without authority to pass the ordinance in question. Municipal corporations are limited to powers granted in express words or those that are necessarily implied in or are incident to the powers expressly granted and those essential to the declared objects and purposes of the corporation,—not simply convenient but indispensable. (*Huesing v. City of Rock Island*, 128 Ill. 465.) State legislatures have plenary power over all public highways, including streets within municipalities, which they may exercise directly or devolve upon the local or municipal authorities. (3 Dillon on Mun. Corp.—5th ed.—pars. 1022, 1222.) Legislative sanction directly given or conferred through municipal action is necessary to authorize the use of streets for posts and wires of telegraph or telephone companies. (3 Dillon

on Mun. Corp.—5th ed.—par. 1220; 1 Elliott on Roads and Streets,—3d ed.—par. 545.) Municipalities, under such legislative authority, may demand reasonable compensation for space in the streets exclusively appropriated by telegraph and telephone companies without in any way conflicting with the act of Congress of 1866, as amended in 1884, with reference to telegraph companies using public highways and streets. (*Western Union Telegraph Co. v. Attorney General*, 125 U. S. 530; *St. Louis v. Western Union Telegraph Co.* 148 id. 93.) It is a presumption of law that the fee of a public street is in the city. (*City of Chester v. Wabash, Chester and Western Railroad Co.* 182 Ill. 382.) The law has long been settled in this State that any city which has the fee under the power to control its streets granted by the Cities and Villages act, may allow any use of them that is not inconsistent with public objects for which they are held. (*Sears v. City of Chicago*, 247 Ill. 204, and cases cited.) The municipalities in this State may regulate such use and fix a reasonable compensation to be paid for the same. (*Lobdell v. City of Chicago*, 227 Ill. 218.) This includes use for the poles of telegraph or telephone companies. (*Chicago Telephone Co. v. Northwestern Telephone Co.* 199 Ill. 324; *Village of London Mills v. White*, 208 id. 289; *McWethy v. Aurora Electric Light Co.* 202 id. 218.) Municipal corporations vested with the control of public property and property devoted to public uses within their territorial limits, including the streets and highways, can impose upon telegraph and telephone companies using the streets of the city by permission or license and not under an irrevocable grant or franchise, a reasonable charge in the nature of a rental for the exclusive use of the parts of the streets occupied by poles. Similar charges may be imposed upon public service corporations occupying the streets of a municipality, not by way of rental but in the exercise of police power, this charge being in the nature of a license fee,—not a tax on the prop-

erty of the company,—for the enforcement of local governmental supervision. 3 Dillon on Mun. Corp. (5th ed.) sec. 1275; *St. Louis v. Western Union Telegraph Co. supra*; *St. Louis v. Western Union Telegraph Co.* 149 U. S. 465; *Postal Telegraph-Cable Co. v. Baltimore*, 156 id. 210; *Western Union Telegraph Co. v. New Hope*, 187 id. 419; *Atlantic and Pacific Telegraph Co. v. Philadelphia*, 190 id. 160.

Under the reasoning of the opinion in *St. Louis v. Western Union Telegraph Co.* 148 U. S. 93, we are disposed to hold that the charge here in question, provided for under section 26 of said ordinance, is not a license fee or a tax, but is a charge in the nature of a rental which appellant is required to pay as a reasonable compensation for the use of the part of appellee's streets and alleys occupied by the poles. The fact that the word "license" appears in the title of the ordinance is immaterial, there being no statutory requirement as to the title of an ordinance. *Chicago Union Traction Co. v. City of Chicago*, 207 Ill. 544.

Counsel for appellant further insist that even though the ordinance in other respects is valid, the trial court improperly held that the burden of proving the unreasonableness of the charge for its poles rests upon appellant. *Prima facie* the ordinance is reasonable. (*St. Louis v. Western Union Telegraph Co.* 148 U. S. 93.) It is presumed to be valid, and the burden is upon those who assert the contrary. *People v. Grand Trunk Railway Co.* 232 Ill. 292; 2 Dillon on Mun. Corp. (5th ed.) 599.

The question whether debt is the proper form of action was not raised in the trial court and cannot therefore be raised here.

We find no reversible error in the record. The judgment of the Appellate Court will therefore be affirmed.

Judgment affirmed.

THE CITY OF PAXTON, Appellee, vs. J. E. FITZSIMMONS,
Appellant.

Opinion filed February 23, 1912.

1. MUNICIPAL CORPORATIONS—*object of laws imposing tax on dogs is regulation.* The object of statutes and ordinances authorizing or imposing a tax on dogs is regulation and not revenue, and, being for regulation, such statutes and ordinances are authorized by the police power and are not within constitutional provisions relating to taxation for revenue.

2. SAME—*an ordinance imposing "tax or fee" on dogs is not invalid.* An ordinance imposing "a tax or fee of two dollars for each male dog and five dollars for each female dog" is not in violation of the constitutional provisions relating to taxation for revenue; and it makes no difference whether the sum to be paid is called a tax, license or fee, or whether the ordinance makes any provision for disposing of the fund so collected.

APPEAL from the Circuit Court of Ford county; the
Hon. T. M. HARRIS, Judge, presiding.

C. E. BEACH, for appellant.

S. LUDLOW, for appellee.

Mr. JUSTICE FARMER delivered the opinion of the court:

This was an action of debt, brought in the circuit court of Ford county to recover a penalty for the alleged violation of an ordinance of the city of Paxton. The ordinance set out in the declaration required the owners and keepers of dogs to pay to the city marshal "a tax or fee of two dollars for each male dog and five dollars for each female dog." The ordinance also required the owner or keeper of the dog to register it at the office of the city marshal, and prescribed a penalty of not less than three dollars nor more than ten dollars for its violation. The declaration, after setting out the ordinance, charged the defendant was the owner or keeper of a female dog within the corporate lim-

its of the city of Paxton, and that he had not paid to the marshal the tax or fee required nor caused the dog to be registered in the office of the city marshal, whereby an action had accrued, etc. A demurrer to the declaration, setting out as special causes the unconstitutionality of the ordinance, was overruled. The defendant elected to stand by his demurrer and refused to plead. It was stipulated that the defendant was the owner of the dog, as alleged; that he had not paid the tax or fee on said dog; that the ordinance set out in the declaration had been duly passed, signed by the mayor and published. The court rendered judgment against the defendant and assessed the plaintiff's damages at five dollars. Defendant prayed an appeal, and on the certificate of the court that the validity of a municipal ordinance was involved and that the public interest required the appeal to be prosecuted direct to the Supreme Court, the appeal was brought direct to this court.

The principal argument made against the validity of the ordinance is that a dog is property, and that the ordinance is in violation of section 1 of article 9 of the constitution, which provides for raising revenue by levying a tax by valuation, so that every person "shall pay a tax in proportion to the value of his, her or its property;" also in violation of sections 9 and 10 of said article 9 of the constitution, which require that taxes levied by the corporate authorities shall be uniform in respect to persons and property.

Clause 80, section 1, article 5, of the Cities and Villages act, confers power upon the city council in cities and the president and board of trustees in villages "to regulate, restrain and prohibit the running at large of horses, cattle, swine, sheep, goats, geese and dogs, and to impose a tax on dogs." It is true, dogs are regarded, in law, as property, but they stand on a different basis from other domestic animals and have always been subject to control and regulation by the exercise of the police power. Statutes and ordinances imposing a tax or license on dogs have been

almost uniformly held to be within the police power of the State and not governed by constitutional provisions relating to taxation for revenue. Ordinances prohibiting dogs from running at large and authorizing the killing of any dog found running at large in violation of an ordinance have been sustained as a valid exercise of the police power and not violative of any constitutional provision. The object of statutes and ordinances for the imposition of a tax or license on dogs is regulation, and not revenue. In *Carthage v. Rhodes*, 101 Mo. 175, the court passed upon the validity of an ordinance requiring the licensing of dogs and cats and providing for their being impounded or destroyed if found running at large. The validity of the ordinance was sustained. The court said: "Taxation may be for the purpose of raising revenue or for the purpose of regulation. Where for the purpose of regulation, it is an exercise of the police power of the State. They are both distinct, co-existent powers in the State, and either or both may be exercised through a municipal corporation. In this case, by the terms of the charter both powers are granted to the city of Carthage as to the dogs of that city. The dog-license tax required by its ordinance is easily referable to the exercise of the police power."

In *VanHorn v. People*, 46 Mich. 183, (41 Am. Rep. 159,) the constitutionality of a statute imposing a tax on dogs was before the court. It was claimed the statute violated the constitutional provision for uniformity and the taxation of property according to its value. The court held the statute was not an emanation from the taxing power within the meaning of the constitution; that it was not for revenue, but was a species of legislation pertaining to the police power of the State.

In *State v. City of Topeka*, 36 Kan. 76, (59 Am. Rep. 529,) the court considered an ordinance passed pursuant to power conferred by act of the legislature, which required the registration of dogs and the payment of a tax of two

dollars for males and five dollars for females. In that case it was contended the ordinance was in conflict with the constitution, which required taxes to be levied at a uniform and an equal rate. The court held the ordinance was valid; that the tax was not for the purpose of raising revenue but for the purpose of regulation and restriction.

In *Holst v. Roe*, 39 Ohio St. 340, (48 Am. Rep. 459,) the court construed the validity of a statute which required dogs over three months old to be listed by the owner without any valuation, but the owner might, if he desired, fix a valuation without swearing to it. The statute further provided that in addition to the tax on the valuation that might be fixed by the owner an additional tax of one dollar on each dog should be levied by the auditor. The court held the statute was a valid exercise of the police power and was not controlled by the constitutional provisions relating to taxation for revenue.

In *Sentell v. New Orleans and Carrollton Railroad Co.* 166 U. S. 698, the Supreme Court of the United States considered the validity of a statute of the State of Louisiana which declared that dogs were personal property and entitled to the same guaranties of law as other personal property, provided they were given in by the owner to the assessor, and unless so listed with the assessor and placed upon the assessment roll no dog was entitled to the protection of the law. The statute further provided that in civil actions for killing or injuring a dog the owner could not recover beyond the value of the dog as fixed by himself in the last assessment. The statute was held valid, and a number of cases are cited and quoted from in the opinion. Among the cases cited with approval is *Ex parte Cooper*, 3 Tex. App. 489. The Supreme Court says: "In *Ex parte Cooper*, 3 Tex. App. 489, it was held that dogs were not property within the tax clause of the constitution, and that a tax upon dogs was a police regulation and a legitimate

exercise of the police power. The point was made that dogs, being property, should, under the constitution, be taxed *ad valorem*, as other property was, but it was held that the law was not a tax law in its ordinary sense, but a police regulation."

In *Cole v. Hall*, 103 Ill. 30, owners of dogs filed a bill to enjoin the collector of taxes from collecting a license fee of one dollar on each dog owned by them, which was imposed under the act of 1879, entitled "An act to indemnify the owners of sheep in cases of damage committed by dogs." This tax is called in the act "a license fee." The court held the act valid as an exercise of the police power, and that the license fee was not a tax within the meaning of the section of the constitution providing for the raising of revenue by levying a tax so that every person shall pay the tax in proportion to his or her property.

Appellant contends the *Cole case* has no application to the ordinance before us, because it was held in *Wiggins Ferry Co. v. City of East St. Louis*, 102 Ill. 560, that there is a difference between a tax and a license, and that the constitutional provision in reference to taxation has no application to fees exacted for a license. It is claimed the exaction imposed by the ordinance before us is not a license fee but is a tax. The ordinance calls it "a tax or fee." But we think it immaterial, when imposed for regulation and restriction under the police power of the State, whether it is called a license, a fee or a tax. This is sustained by the authorities above cited.

Appellant also contends that there is a material difference between the statute authorizing a tax or license fee against dogs and the ordinance before us. The difference pointed out is, that the statute requires the money collected from the dog tax or license fees to be applied to the reimbursement of persons whose sheep have been killed or injured by dogs running at large, while the ordinance makes no provision for the application of the fund collected under

it. In *Cole v. Hall*, *supra*, the court held what disposition was to be made of the fund, when collected, could not affect the validity of the statute, and the same rule is applicable to the ordinance.

The demurrer was properly overruled, and the judgment of the circuit court is affirmed.

Judgment affirmed.

THE CITY OF PARK RIDGE, Appellee, vs. ALBERT WISNER,
Appellant.

Opinion filed February 23, 1912.

1. SPECIAL ASSESSMENTS—*when judgment is appealable though further controversy is not waived.* Where the question of benefits is submitted and decided after the overruling of the legal objections the judgment is appealable, notwithstanding further controversy was not waived as to the remaining questions on the record after the overruling of the legal objections.

2. SAME—*item of estimate for lump sum for "lawful expenses" does not invalidate assessment.* An item of the engineer's estimate reading, "Lawful expenses, \$264.07," does not invalidate the assessment upon the alleged ground that the amount should have been itemized and should have been designated as for "cost of making, levying and collecting the assessment."

3. SAME—*when cost of gutters need not be itemized separately.* An item of the engineer's estimate for a certain number of square yards of described macadam pavement, "including cost of gutters," is not objectionable upon the alleged ground that the cost of constructing the gutters should have been itemized separately, where it appears, by reading the estimate and ordinance together, that the pavement itself is to be so constructed as to form the gutters.

4. SAME—*when a description of binder for the top course of pavement is not too vague.* A description of the binder for the top course of the pavement, which requires the binder to be made of "lake asphalt, or some other equally good bituminous asphalt binder," is not so uncertain as to render the ordinance invalid.

5. SAME—*if possible, an ordinance should be so construed as to sustain it.* If an ordinance is susceptible of two constructions, one of which will render it valid and the other invalid, courts should adopt the construction which will sustain it.

6. SAME—*finding upon question of benefits should not be disturbed unless clearly against weight of evidence.* Where the question of benefits is tried by the court, its finding, based upon the testimony of witnesses seen and heard by the court, should not be disturbed by a court of review unless clearly against the weight of the evidence.

APPEAL from the County Court of Cook county; the Hon. DAVID T. SMILEY, Judge, presiding.

GEORGE A. MASON, for appellant.

JOHN S. DORNBLASER, (GEORGE BURRY, City Attorney, of counsel,) for appellee.

Mr. CHIEF JUSTICE CARTER delivered the opinion of the court:

This is an appeal from a judgment of the county court of Cook county overruling legal objections and confirming an assessment for paving with macadam Center street, in the city of Park Ridge, from the easterly line of Washington street to the eastern limits of the city.

The first question necessary to be decided is whether the case is properly here. It is urged by the appellee that further controversy was not waived as to the remaining questions on the record after the hearing of the legal objections. This was unnecessary, as the question of benefits was submitted to and decided by the trial judge (jury being waived) after the legal objections were overruled. The objection as to the judgment was properly preserved in the record and the judgment was appealable.

The total cost of the improvement was estimated to be \$4401.07. One of the items was, "Lawful expenses, 264.07." It is argued by appellant that it is impossible to tell what elements of cost are included in the phrase "lawful expenses;" that this item should have read, "Cost of making, levying and collecting the assessment;" that ex-

penses not proper to be made a part of the cost for collecting and levying might be included in the phrase "lawful expenses." The decisions of this court in *Snydacker v. Village of West Hammond*, 225 Ill. 154, *Northwestern University v. Village of Wilmette*, 230 id. 80, and *Gage v. Village of Wilmette*, 230 id. 428, dispose of this objection contrary to appellant's contention. In those cases it was held that the term "lawful expenses" would not cover those that were unlawful. It is also urged that the \$264.07 should be itemized. This court held to the contrary in the decisions last cited and in *City of East St. Louis v. Davis*, 233 Ill. 553.

It is further objected that the estimate is not properly itemized as to gutters. The item of the estimate covering the pavement and gutters reads: "2867 square yards of macadam paving, [here follows a specific description of the materials entering into the macadam,] including the cost of constructing gutters at \$1.50, \$3727.10." Reading the estimate and the ordinance together, (*City of Hillsboro v. Grassel*, 249 Ill. 190,) it appears that the pavement itself is so graded and constructed as to form the gutters along the sides of the roadway. It is clear that the material entering into the construction of the pavement is identical with that of the gutters. The gutters do not form separate, essential, component elements of the improvement. It would therefore serve no useful purpose to have the cost of the gutters itemized separately. The authorities cited by appellant on this point refer to cases where the gutters were made of different material from the pavement itself. Under such circumstances the gutters form a separate, substantial, component element of the improvement and should be itemized separately from the pavement itself. (*Hulbert v. City of Chicago*, 213 Ill. 452, and cases cited.) Such is not the case here.

Appellant further urges that the description as to the binder for the top course is so vague and uncertain as to

render the ordinance invalid. The ordinance provides that this binder is to be made of "lake asphalt, or some other equally good bituminous asphalt binder." Proof was offered on the part of appellant tending to show that there are two kinds of lake asphalt, and it is argued that as this evidence tended to show that the two kinds were somewhat different in character, the ordinance set up a "double standard" as to the asphalt. In *Jacksonville Railway Co. v. City of Jacksonville*, 114 Ill. 562, this court upheld an ordinance which provided that the foundation of a brick pavement should be "laid of cinders, sand, gravel, or other materials equally suitable." In *Hintze v. City of Elgin*, 186 Ill. 251, this court held an ordinance good which provided "all brick to be used shall be made of pure shale of equal quality to that found in Galesburg, Glen Carbon and Streator, in the State of Illinois, and Canton, in the State of Ohio." Following these decisions this objection must be overruled.

It is further objected that as the testimony of a witness for appellant tended to show that lake asphalt, unless it was fluxed, would not make a proper binder for a top course, and as from this witness' testimony it must be concluded that the ordinance, properly construed, could only mean pure asphalt, the improvement could not be constructed in a workmanlike manner, as provided in the ordinance. This witness did testify, on direct examination, that he would construe the ordinance as meaning pure asphalt, but, taking all his examination together, direct and cross, (the abstract and the record do not agree as to his evidence,) the conclusion can be fairly reached that he thought the reasonable presumption, from reading the whole ordinance, was that the term "lake asphalt binder" would mean lake asphalt so treated that it could be used for a top dressing binder. While the ordinance is not well worded in this regard, we think it is fairly susceptible of this latter construction. When two constructions of an ordinance are possible, one of which will render it invalid

and the other sustain it, the court will adopt that construction which sustains it. (*City of Chicago v. Wilshire*, 243 Ill. 123, and cases cited.) Under somewhat similar ordinances this court has held a description of a binder course sufficient. *Chicago Union Traction Co. v. City of Chicago*, 222 Ill. 144; *Same v. Same*, 223 id. 37.

It is further objected by appellant that the assessment exceeds the benefits. Several witnesses testified both for the city and the objector on this point. The testimony of various witnesses as to the amount of benefits to the property was not in harmony. The jury was waived and this question heard by the court. The trial court saw and heard the witnesses. Its finding should not be disturbed on this question unless the weight of the testimony was palpably against it, (*City of Chicago v. Marsh*, 238 Ill. 254; *Topliff v. City of Chicago*, 196 id. 215;) and on this record we are not disposed to do so.

One of the witnesses for the city on the question of benefits having stated, on cross-examination, that the property objected for was capable of subdivision, counsel for appellant asked, "How many streets do you think it would be necessary to put in there, running north and south, to subdivide it?" and the witness answered, "I haven't given it any thought and I don't intend to do so." The court refused to require a different answer. The last part of the answer should have been stricken out. However, if the witness had not given any thought to the matter his opinion as to the number of streets necessary would have been of no material assistance to the court, and therefore it was not reversible error not to compel him to answer the question further.

There are some other questions discussed in the briefs of minor importance, but in view of the conclusions already reached we deem it unnecessary to consider them.

The judgment of the county court will be affirmed.

Judgment affirmed.

THE DELTA BAG COMPANY, Defendant in Error, vs. WILLIAM H. KEARNS, Plaintiff in Error.

Opinion filed February 23, 1912.

1. PRACTICE—*facts to be recited in Appellate Court's judgment are ultimate facts.* The facts to be recited in the Appellate Court's judgment under section 120 of the Practice act, where the reversal is the result, wholly or in part, of a finding of facts different from that of the trial court, are ultimate and not evidentiary facts.

2. SAME—*Supreme Court cannot look to the Appellate Court's opinion for the facts.* The recital of facts upon which a judgment of the Appellate Court, entered under section 120 of the Practice act, is based must be incorporated in the judgment itself, and the opinion of that court cannot be resorted to by the Supreme Court to ascertain the facts.

3. SAME—*what finding is a mere conclusion of law.* A finding by the Appellate Court that "there is no evidence in the cause showing any infraction of the law of Illinois concerning foreign corporations by the plaintiff corporation before the beginning of this suit" is not a finding of fact but is a conclusion of law.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. RICHARD CLIFFORD, Judge, presiding.

WILLIAM A. DOYLE, (JOSEPH J. THOMPSON, of counsel,) for plaintiff in error.

HELMER, MOULTON & WHITMAN, for defendant in error.

Mr. CHIEF JUSTICE CARTER delivered the opinion of the court:

Defendant in error, a corporation doing business in New Orleans, brought replevin, February 22, 1900, in the circuit court of Cook county, against plaintiff in error, doing business in Chicago as J. P. Kearns & Co., to recover a carload of burlaps. The declaration also contained a count in

trover, and as the property had been converted, recovery could only be had on the trover count. Trial was had before a court and jury, resulting in a verdict of guilty and judgment thereon, from which an appeal was taken to the Appellate Court, where the judgment was reversed and the cause remanded. (112 Ill. App. 269.) On the second trial in the circuit court a jury was waived and the court entered judgment for plaintiff in error. On a second appeal the Appellate Court reversed the judgment with a finding of facts and entered judgment in that court against plaintiff in error. From that judgment the case is brought here by writ of *certiorari*.

The evidence shows that, as a result of negotiations by telegraph and letter, defendant in error sold G. E. Daniels & Son, of New York City, the burlaps in question, making the shipment to Chicago on February 7, 1900, over the Illinois Central railroad. The bill of lading was delivered to defendant in error at New Orleans, and thereupon sent, together with an invoice, to Daniels & Son, but was never endorsed by them and never came into the possession of plaintiff in error, being returned to defendant in error later by Daniels & Son. At about the same time Daniels & Son sent an invoice of the same goods to plaintiff in error at Chicago, which was received February 9, 1900, showing a credit thereon of \$900, leaving a balance due from him to Daniels & Son of \$971. The credit appears to have been given by reason of a sight draft paid by J. P. Kearns & Co. to Daniels & Son on account of a car-load of burlaps ordered by the former firm from the latter. Daniels & Son had caused this car-load to be sent to Chicago by the Delta Bag Company to fill Kearns & Co.'s order. On the same day plaintiff in error received this invoice he also received a telegram to the effect that Daniels & Son had made an assignment for the benefit of creditors. Having ascertained from its agent at Chicago that the car-load of burlaps was in Chicago, plaintiff in error made a demand upon the rail-

road company for its delivery. This demand was refused. A suit in replevin was then begun against the railroad company, on which, after the payment of freight, the plaintiff in error received the goods in question. To recover these goods or their value this suit was begun.

It is insisted by the plaintiff in error that the finding of facts by the Appellate Court amounts, in reality, to conclusions of law. That part of the finding objected to by counsel reads as follows: "The court further finds that the evidence introduced for the first time at the last hearing of the cause in the circuit court does not change in any material sense the case as presented to this court by the record in cause No. 11,171, decided by this court on February 25, 1904, and reported in 112 Ill. App. 269, and that it does not show any order on the Illinois Central Railroad Company for the delivery of goods involved, to the appellee, Kearns, not shown in the former hearing of the cause.

And the court further finds that there is no evidence in the cause showing any infraction of the law of Illinois concerning foreign corporations by the plaintiff corporation before the beginning of this suit."

One of the principal questions at issue in the trial of this cause was whether the defendant in error had the right to stop the goods *in transitu* before they were finally delivered by Daniels & Son to plaintiff in error. The cause was reversed by the Appellate Court on the first appeal because of errors on rulings of law but without any finding of facts. Section 120 of the Practice act, which provides for the Appellate Court reversing the trial court as the result, wholly or in part, of a finding of facts different from the finding of the trial court, states that it shall be the duty of the Appellate Court "to recite in its final order, judgment or decree, the facts as found." It is the ultimate and not the evidentiary facts in controversy that are to be so recited. (*City of Chicago v. Roemheld*, 227 Ill. 160; *National Life Ins. Co. v. Metropolitan Life Ins. Co.* 226 id. 102.)

Whether or not the fact, if it be a fact, that the evidence in the record does not "show any order on the Illinois Central Railroad Company for the delivery of goods involved, to the appellee, Kearns," is decisive of defendant in error's right to stop the goods *in transitu*, (which we do not decide,) the recital of facts does not show such finding. It only shows that the new evidence introduced on the second trial does not show such an order. True, it does say that the evidence does not change in any material sense the case as presented on the first hearing, but for this court to pass understandingly on such a recital of facts would require an examination of the evidence heard on the first trial, either as shown by the Appellate Court's opinion in 112 Ill. App. 269, or by the record in that case. This court has repeatedly held that it is indispensable that the recital of the facts upon which the judgment of the Appellate Court was entered should be incorporated in the final order of that court; that the opinion of that court cannot be resorted to to ascertain the facts upon which it based its conclusions; that this court must be governed by the recital of facts in the judgment itself. (*Martin v. Martin*, 202 Ill. 382, and cases cited.) Manifestly, the first paragraph of the finding above quoted does not comply with the provisions of section 120 of the Practice act as construed by this court.

The last paragraph of the finding of facts as quoted, to the effect that there was no evidence showing any infraction of the laws of Illinois concerning foreign corporations by defendant in error before the beginning of this suit, is not the finding of an ultimate fact but a conclusion of law.

The judgment of the Appellate Court is reversed and the cause remanded to that court, with directions to recite the facts in its final order upon which the judgment of reversal is predicated, and if it shall still be of the opinion that the final judgment should be entered in that court, to so enter it, or if said court reverses said judgment for er-

rors of law, to remand the case to the circuit court for another trial. Leave is granted to withdraw the record filed here, for the purpose of re-filing it in the Appellate Court.

Reversed and remanded, with directions.

THE PEOPLE *ex rel.* Clifford Quisenberry, County Collector,
Appellee, *vs.* WILLIAM S. ELLIS, Appellant.

Opinion filed February 23, 1912.

1. TAXES—*a personal judgment for costs cannot be rendered upon application for judgment against real estate.* Upon application by the collector for judgment against real estate, subjecting it to the payment of taxes, penalties and costs, there is no personal liability of the land owner for costs, and it is error to render a personal judgment against him for such costs.

2. SAME—*when section 276 of Revenue act, authorizing judgment for interest or penalties, does not apply.* Section 276 of the Revenue act, authorizing judgment for interest or penalties where real estate has been omitted in the assessment or has been defectively described or assessed, does not apply where the land has been listed for taxation and all taxes extended against it have been paid but the judgment is sought for city taxes alleged to have been omitted in previous years and claimed to be due because of the invalidity of proceedings disconnecting the land from the city.

3. MUNICIPAL CORPORATIONS—*when determination of city council has effect of a judgment.* Where any official body or tribunal, such as a city council, is given authority to hear and determine any question, its determination is, in effect, a judgment having all the properties of a judgment pronounced by a legally created court of limited jurisdiction.

4. SAME—*determination of city council in proceeding to disconnect territory cannot be collaterally attacked.* Where a petition to disconnect territory is filed, the city council acquires jurisdiction to decide all preliminary questions concerning the sufficiency of the petition and the steps required by the statute to authorize the passage of the ordinance, and if it commits an error its action and decision cannot be attacked in any proceeding not for the direct purpose of impeaching its action.

5. SAME—*in a collateral attack the person alleging want of jurisdiction must prove the fact.* In a collateral attack upon pro-

ceedings by a city council for the disconnection of territory upon the ground that there was a want of jurisdiction, the person alleging such want of jurisdiction has the burden of proving the fact.

6. SAME—*when validity of proceeding by which municipal corporation is created cannot be determined in collateral proceeding.* The validity of the proceeding by which a municipal corporation was created cannot be determined in a collateral proceeding involving the enforcement of an ordinance or the liability to a penalty or tax.

7. SAME—*city or village cannot deny its corporate existence to escape liabilities.* A city or village cannot be called upon to prove the regularity of its incorporation or its legal existence, either in a suit for penalties imposed by it or for obligations to it; and the same rule precludes the municipal corporation from denying its corporate existence for the purpose of escaping liabilities or evading its obligations.

8. SAME—*annexation or disconnection is pro tanto a new organization.* An annexation or disconnection of territory is *pro tanto* a new organization of the municipality, and an act providing for annexation or disconnection of territory is an act for changing the charter of cities or villages, and is upon the same footing as an act for original incorporation.

9. SAME—*disconnection proceeding is not open to collateral attack for defect in exercise of jurisdiction.* Where the ordinance for disconnecting territory shows that a petition was filed and that the disconnection was in pursuance thereof, the city cannot, in a collateral proceeding, question the validity of the ordinance upon the ground that no petition was found by the city clerk, or that there is no proof that the petition referred to in the ordinance was filed ten days before the action of the city council, or that the collector's certificate of payment of taxes (which the ordinance found were paid) was filed with the petition.

10. SAME—*effect of provision of statute that copy of disconnection ordinance shall be recorded.* The purpose of the provision of the statute that a certified copy of the disconnection ordinance shall be filed in the recorder's office and another with the clerk of the county court is to give notice of the change of incorporation, so that the territory disconnected may be excluded in the extension of taxes, and if the territory is, in fact, so excluded the certified copies may be filed at any time thereafter.

11. SAME—*disconnected territory cannot be annexed by repealing a disconnection ordinance.* The disconnection of territory is consummated upon the passage of the ordinance providing for such disconnection, and the territory cannot thereafter be annexed by

merely repealing the disconnection ordinance, even though the certified copies of such ordinance have not yet been filed as required by law, where the territory has, in fact, been excluded in the extension of city taxes from the time it was disconnected.

APPEAL from the County Court of Logan county; the Hon. JAMES T. HOBLIT, Judge, presiding.

BEACH & TRAPP, for appellant.

C. EVERETT SMITH, State's Attorney, MILTON M. HOOSE, City Attorney, FRANK S. BEVAN, and KING & MILLER, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

To the application of the county collector to the county court of Logan county for judgment against real estate of the appellant, William S. Ellis, for delinquent city taxes of the city of Atlanta for the year 1910, and city taxes which it was alleged ought to have been extended against the same property for the years 1902 to 1908, inclusive, the appellant filed objections on the ground that during said years the real estate was not within the corporate limits of the city and had been disconnected therefrom on March 4, 1901. To prove the disconnection appellant testified that he filed a petition prepared for him by a practicing attorney in the city of Atlanta, asking the city council to disconnect the real estate from the city, and he offered in evidence the minutes of the meeting of the city council held on January 11, 1901, as follows: "Petition of W. S. Ellis relative to property in the city limits was granted.—J. E. Foltz, City Clerk." The act then in force authorizing the city council to disconnect real estate from the city was entitled "An act in relation to the disconnection of territory from cities and villages," in force May 29, 1879, (Laws of 1879, p. 77,) which required the passage of an ordinance by the

city council, so that the entry in the minutes was not effective to disconnect the real estate. It was only relevant to show that there was a petition of the appellant relative to property which was then in the city limits. Appellant then offered in evidence the minutes of a meeting of the city council held on March 4, 1901, as follows: "The following ordinance, No. 75, relative to disconnecting William Ellis' land from corporate limits of the city of Atlanta, was read and passed by nay and aye vote, in sections and as a whole, on passage," and the names of the aldermen voting were given. The ordinance was then offered in evidence and is as follows:

"An ordinance disconnecting certain lands.

"Be it ordained by the city council of Atlanta, Illinois:

"Sec. 1. That the petition of William Ellis for disconnecting of the following described lands, to-wit: Commencing thirty and two-thirds rods west of the south-east corner of the south-west quarter of section 20, in township 21, north, range 1, west of the third principal meridian; running thence north to lot 1, in Downey's addition to Atlanta; thence west to the right of way of the Chicago and Alton Railroad Company; thence south-westerly along the east side of said right of way to the west line of said section 20; thence south to the south-west corner of said section, and thence east to the place of beginning; that as the taxes on the said lands have been fully paid and none of the lands ever having been laid off in lots, it is hereby declared that the said lands heretofore described are hereby disconnected from the corporate limits of the said city of Atlanta, as requested by the said petition, and that it take effect from and after its passage.

"Sec. 2. It is further provided that the city clerk is hereby instructed to deliver a copy of this ordinance to the petitioner."

The original petition could not be found by the present city clerk. After the passage of the ordinance no city

taxes were levied on the property in question nor extended against it, but the appellant and the city acted under the ordinance and recognized it as having disconnected the real estate from the city. On September 6, 1909, the city council passed an ordinance repealing ordinance No. 75. The court refused to admit in evidence a certified copy of ordinance No. 75, recorded in the office of the recorder on February 15, 1911, after the passage of the repealing ordinance. The court entered a judgment finding that the proceeding to disconnect the real estate from the city was defective and insufficient because the evidence failed to show any sufficient petition filed by appellant with the city council, and also failed to show that any certified copy of the ordinance was filed with the recorder of the county and recorded, and also filed with the county clerk prior to the passage of the repealing ordinance, and ordered the real estate sold for all the taxes, together with interest and penalties. There was also a personal judgment against the appellant for costs.

The application of the collector was for judgment against the real estate, subjecting it to the payment of the taxes, penalties and any costs that might be incurred in the proceeding. There is in such cases no personal liability of the land owner for costs, and the court erred in rendering a personal judgment for the same against the appellant. *Merritt v. Thompson*, 13 Ill. 716.

The court included in the judgment \$84.91 for interest or penalties, which it is alleged was authorized by section 276 of the Revenue act. That section does not apply, since the real estate in question was listed for taxation during all the years and was assessed and all taxes extended against it were paid. It was not property omitted in the assessment or defectively described or assessed, and it was error to enter judgment for the interest provided for by section 276, as penalties. *Hayward v. People*, 156 Ill. 84.

The act under which the proceeding to disconnect appellant's property was had, authorized the city council, upon the presentation of a petition by him praying for such disconnection and filed with the city clerk at least ten days before the meeting of the city council, together with a certificate of the county clerk showing that all city taxes or assessments due had been fully paid, to disconnect, by ordinance, the territory described in the petition from the city. The city council being authorized to act upon such a petition as complied with the statute, was necessarily authorized to determine the sufficiency of the petition and whether there had been such a compliance with the statute as authorized the passage of the ordinance. The rule of law is, that where any official body or tribunal, such as a city council, is given authority to hear and determine any question, its determination is, in effect, a judgment having all the properties of a judgment pronounced by a legally created court of limited jurisdiction. When a petition was filed the city council acquired jurisdiction to decide all preliminary questions concerning the sufficiency of the petition and the steps required by the statute to authorize the passage of the ordinance, and if it committed an error its action and decision could not be attacked in any proceeding not for the direct purpose of impeaching its action. (*People v. Chicago, Burlington and Quincy Railroad Co.* 231 Ill. 463; 17 Am. & Eng. Ency. of Law,—2d ed.—1056; VanFleet on Collateral Attack, 79.) It is, of course, necessary in such a case, as in all others, that the body or tribunal shall have jurisdiction to act, and when it was proved in *People v. Chicago, Burlington and Quincy Railroad Co. supra*, that the petition for disconnection was by one who did not own the land and that there was no jurisdiction, it was held that the proceeding could be attacked collaterally. Even in such a case the burden in a collateral action is on the party alleging a want of jurisdiction to prove the fact. That was decided in two cases where elections had been held in town-

ships adopting the labor system under the Road law. Such an election could not be held without a petition in compliance with the statute, but it was decided that proof that the town clerk could not find in his office any petition, or record of a petition, under which an election could have been held was not sufficient and did not even raise an inference that no petition was filed. (*Toledo, St. Louis and Western Railroad Co. v. People*, 225 Ill. 425; *People v. Toledo, St. Louis and Western Railroad Co.* 231 id. 390.) The same rule would necessarily apply here if the only evidence that no petition was filed consisted of the failure to find one, but there was evidence that the petition was filed, both by the testimony of the appellant and the recitals of the ordinance. The first part of the ordinance is incomplete, but it shows that a petition was filed and the disconnection was made as requested by the petition.

It is also a rule of law applicable to this case that the validity of the proceeding by which a municipal corporation is created cannot be determined in a collateral proceeding involving the enforcement of an ordinance or the liability to a penalty or tax, whether the objection is that the charter was never published as required by its terms or that its requirements were not complied with in any respect, or that the proceeding was defective or insufficient for any other cause. (*Town of Mendota v. Thompson*, 20 Ill. 197; *Hamilton v. President and Trustees of Carthage*, 24 id. 22; *Tisdale v. Town of Minonk*, 40 id. 9; *Kettering v. City of Jacksonville*, 50 id. 39; *Village of Nunda v. Chrystal Lake*, 79 id. 311.) A city or village cannot be called upon to prove the regularity of its incorporation or its legal existence, either in a suit for penalties imposed by it or obligations to it, and the rule is the same for both parties, and precludes the corporation itself from denying its corporate existence for the purpose of escaping liabilities or evading its obligations. An indispensable element of a municipal corporation is territory, and an annexation of

territory is to that extent a new organization of the municipality. An annexation of territory to a city or disconnection of territory from it is *pro tanto* a new organization of the municipality, and an act providing for annexation or disconnection is an act for changing the charter of cities and is upon the same footing as an act for original incorporation. (*State v. DesMoines*, 96 Iowa, 521; *City of Topeka v. Dwyer*, 70 Kan. 244; 3 Ann. Cas. 239.) The doctrine has been applied in a great many cases of annexation, where it has been held that the proceeding of the city council is not open to collateral attack for any defect in the exercise of jurisdiction. (*City of Albia v. O'Hara*, 64 Iowa, 297; *Powell v. City of Greensburg*, 150 Ind. 148; *Schriber v. Langlade*, 66 Wis. 610; *Sage v. Plattsmouth*, 48 Neb. 558; *People v. Smith*, 131 Mich. 70.) There is no ground for a distinction between a proceeding for annexation and one for disconnection of territory, and an immunity from collateral attack which exists in one case must necessarily apply to the other. The city did not have the right to question, collaterally, the validity of the ordinance on the ground that no petition was found by the city clerk, or that it was not proved that the petition which the evidence and recitals of the ordinance referred to was filed ten days before the action of the city council, or that the certificate of the county collector as to the payment of taxes, which the ordinance found had been paid, was filed with the petition.

The other fact recited in the judgment and upon which it was based was, that the evidence failed to show that any certified copy of the ordinance was filed with the recorder or county clerk prior to the passage of the repealing ordinance. Section 2 of the act for disconnection of territory provided that a certified copy of the ordinance should be filed for record and recorded in the recorder's office and another certified copy should be filed with the clerk of the county court. The language was imperative in requiring

the certified copies to be filed, but the duty was not charged by the statute upon the petitioner and rested upon the city for the evident purpose of giving notice of the change in its incorporation. Section 1 specified the steps to be taken to disconnect property, and the disconnection was consummated upon the passage of the ordinance. (*People v. Binns*, 192 Ill. 68.) It would be necessary that the county clerk should have notice by some method that the territory was disconnected so that it might be excluded in the extension of taxes, and the records of the recorder's office are for the purpose of giving notice to the public. The provision for filing the certified copies could not have had any other object or served any other purpose, and comes within the description of directions given with a view merely to proper and orderly conduct of the business of disconnecting property and the assessment and collection of taxes. Such provisions, in whatever language expressed, are directory in their nature, where no right of anyone interested is lost or prejudiced by the failure to perform the act or by the time when it is performed. (*Farwell v. Cohen*, 138 Ill. 216; *Cooley's Const. Lim.* 78.) The substantial purpose of that section was accomplished by omitting the property in the extension of taxes as it was omitted after the passage of the ordinance. The county clerk had the notice which the statute intended to furnish him, and no advantage was lost and no right destroyed by the failure to file the certified copies. Inasmuch as the property was disconnected by the passage of the ordinance it could not be annexed to the city by repealing the ordinance, and the requirement that certified copies should be filed being directory, they might be filed at any time. The findings of the court were erroneous and the judgment based on them cannot be sustained.

The judgment is reversed and the cause is remanded.

Reversed and remanded.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, vs.
HENRY C. WHITTEMORE *et al.* Appellants.

Opinion filed February 23, 1912.

1. BONDS—*laches in asserting breach of State officer's bond is not imputable to State.* Laches or unreasonable delay on the part of State officers in asserting a breach of a State Treasurer's bond is not imputable to the State when acting in its character of a sovereign.

2. SAME—*what may be required of creditor by surety.* In the absence of any statutory provision, all that a surety has a right to require of his creditor is that no affirmative act shall be done that will operate to his prejudice.

3. PUBLIC OFFICERS—*when the State is not estopped to declare breach of State Treasurer's bond.* The circumstances under which the State may be estopped are such, only, as render the application of the doctrine necessary to remedy serious mischief to individuals, and the mere fact that State officers for many years fail to declare a breach of a State Treasurer's bond does not estop the State from subsequently declaring it.

4. SAME—*State Treasurer's reports to Governor are not stated accounts.* There are no constitutional or statutory provisions authorizing the Governor to settle and adjust the accounts of the State Treasurer, and the latter's reports to the Governor, which do not disclose illegal payments of money to such State Treasurer without any appropriation therefor having been made by the legislature, are not stated accounts which are conclusive upon the State. (*State v. Illinois Central Railroad Co.* 246 Ill. 188, distinguished.)

5. SAME—*State Treasurer's settlements with taxing districts do not bind the State.* The State Treasurer's settlements with taxing districts, relating to money of the State, have no effect upon the rights of the State with reference thereto.

6. SAME—*when an erroneous construction cannot be held to be correct though followed by many officials.* If a provision of the constitution or a statute is clear and unambiguous, an erroneous construction thereof cannot be held to be correct by reason of the number of public officials who have followed such erroneous construction or the length of time such construction has remained unquestioned. (*Whittemore v. People*, 227 Ill. 453, adhered to.)

7. SAME—*what does not release surety on a State Treasurer's bond.* The facts that no suits were brought against certain of the solvent sureties on a State Treasurer's bond during their lifetime

and that the claims against their estates are barred by the Statute of Limitations do not release a co-surety from a liability, which is otherwise enforceable, for a breach of such State Treasurer's bond.

8. CONSTITUTIONAL LAW—*when parties cannot raise a constitutional question.* In a proceeding to establish a claim against the estate of a surety on a State Treasurer's bond for money raised by taxation which the State Treasurer illegally paid to himself without any appropriation, the executors of the surety's estate cannot raise the question that the act under which the money was collected is unconstitutional, as courts will not entertain objections to the constitutionality of an act urged by persons whose rights have not been affected.

APPEAL, from the Circuit Court of Sangamon county; the Hon. JAMES A. CREIGHTON, Judge, presiding.

GEORGE B. GILLESPIE, and A. M. FITZGERALD, for appellants.

W. H. STEAD, Attorney General, (B. F. LINCOLN, of counsel,) for the People.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The appellants, Henry C. Whittemore, Harry M. Whittemore and Floyd Whittemore, executors of the last will and testament of Floyd K. Whittemore, deceased, appealed to the circuit court from a judgment of the probate court of Sangamon county allowing a claim in favor of the appellee, the State of Illinois, against the estate of Whittemore. A jury was waived and the cause was tried by the circuit court. The claim was founded on two warrants. The first, (No. 6859,) for \$9286.25, was issued on September 30, 1878, and the second, (No. 8696,) for \$9541.85, was issued on September 30, 1882. Both warrants were drawn in favor of Edward Rutz, State Treasurer, for services in collecting and disbursing interest on registered bonds of local municipalities. Rutz was State Treasurer

for two terms of two years each, one term beginning on the second Monday in January, 1877, and the other on the second Monday in January, 1881. Floyd K. Whittemore was one of the sureties on the official bond of Rutz for each term. The warrants were issued on vouchers made by Rutz and filed with the Auditor of Public Accounts. The voucher on which No. 6859 was issued was "for expenses of receiving, disbursing and keeping accounts of taxes collected, for payment of interest, etc., on registered bonds of the localities named, including clerical services for the work in the State Treasurer's office on account of such registered bonds and other expenses in connection therewith, as estimated by the Auditor and Treasurer in pursuance of law." The voucher on which the second warrant (No. 8696) was issued was substantially the same as the previous one, except that the amount was \$9541.85. Rutz received the warrants and paid the several amounts to himself, and the amounts so paid were in addition to his salary as State Treasurer and were paid without any appropriation having been made therefor. This was done in accordance with the custom which had prevailed since the enactment of the statute of 1869, providing for paying railroad debts of counties, townships, cities and towns. (Laws of 1869, p. 316.) After these payments were made by Rutz to himself he made the reports to the Governor required by the constitution and laws of the State, but in such reports he made no mention of the warrants, or either of them, or that he had paid to himself any part of the moneys collected and paid into the State treasury as the costs to the State of collection, or any mention of the fact that he had paid to himself any moneys out of the State treasury in addition to his salary and without any appropriation therefor having been made by law. No suits were commenced on either bond of Rutz and no question was raised by any Governor as to the legality of the payments until Charles S. Deneen became Governor of the State. Edward Rutz,

the principal, and John Thomas, Jacob Bunn, C. Wolf, William McCague, J. M. Darneille and George M. Brinkerhoff, who were sureties on the bonds, are each insolvent. The remaining sureties, besides Whittemore, were Samuel H. Jones and Frank W. Tracy. Jones died leaving real and personal property in the county of Sangamon worth \$500,000 in excess of all indebtedness, and on January 11, 1907, his last will and testament was admitted to probate in the probate court of Sangamon county. There was no suit against Samuel H. Jones on the bond and no claim on the same was ever presented against his estate; and his property passed to his devisees by the provisions of his will. Frank W. Tracy died leaving property worth more than \$200,000 in excess of all indebtedness, and his last will and testament was admitted to probate in the probate court of Sangamon county on December 19, 1903. There was no suit against him on the bond and no claim founded on it was filed against his estate, and his property passed under his will. Any claim against the estate of Samuel H. Jones or Frank W. Tracy is barred by the Statute of Limitations. The court, upon a consideration of these facts, rendered judgment for the amount of the warrants, and this appeal was prosecuted.

Appellants depend for a reversal of the judgment upon the following propositions: (1) The State is estopped, by its long acquiescence and delay, to declare a breach of the bond; (2) settlements with the taxing districts and reports to the Governor constitute stated accounts and final settlements between the State Treasurer and the taxing districts, which cannot be inquired into either by the districts or the State; (3) by uniform, practical construction of the act under which the money was collected the Treasurer was entitled to take therefrom, for himself, the amount of the warrants; (4) the statute under which the money so sued for was collected is unconstitutional; (5) by neglecting to file claims against the estates of Tracy and Jones appellants

are released as to the proportion of liability which those estates should bear. Propositions of law embodying these claims were submitted to the circuit court and were refused.

The first proposition does not state a correct rule of law as to the rights of sureties even where the State is in no manner interested, and the general rule is, that *laches*, acquiescence or unreasonable delay in the performance of duty on the part of the officers of the State is not imputable to the State when acting in its character of a sovereign. (*People v. Pullman Palace Car Co.* 175 Ill. 125.) Rutz was insolvent, so that any question relating to the duty owing to a surety to proceed against the principal is not involved. All that a surety has a right to require of his creditor, in the absence of any statutory provision, is, that no affirmative act shall be done that will operate to his prejudice. (*Villars v. Palmer*, 67 Ill. 204.) Counsel say, however, that in *People v. Pullman Palace Car Co. supra*, the court recognized that there are exceptions to the general rule and that there may be circumstances under which the State would be estopped. Minor municipalities, in the exercise of purely public rights, stand in the same relation to the doctrine of estoppel as the State, (*Brown v. Trustees of Schools*, 224 Ill. 184,) and as they have been held to be estopped by their conduct respecting public highways and streets, it is contended that delay and long acquiescence of the general public and public officers may estop the State as to public rights. It is true that where the State has committed to minor municipalities the authority to lay out, open, control and vacate or abandon public highways and streets, the doctrine of estoppel has been applied if private parties have been induced to believe that a highway or street had been abandoned, and with the acquiescence of the authorities having control of the highway or street have made improvements thereon and brought about such a condition that if those representing the public were allowed to allege something contrary to their own acts and conduct

great pecuniary loss would result. (*Lee v. Town of Mound Station*, 118 Ill. 304; *Jordan v. City of Chenoa*, 166 id. 530; *City of El Paso v. Hoagland*, 224 id. 263; *People v. Wieboldt*, 233 id. 572.) There is in this case no element of estoppel such as existed in the cases of highways and streets where individuals had acted upon the faith of the conduct of public officers and the public generally, or any other case where the doctrine of estoppel has been applied to the State or a municipality representing public rights. The circumstances under which the State could be estopped could only be such as would render the application of the doctrine necessary to remedy serious mischief to individuals. The delay in this case could not work an estoppel.

It is next claimed that the settlements with the taxing districts and reports to the Governor constitute stated accounts and final settlements, which cannot be inquired into. Any settlement with a taxing district relating to the money of the State would have no effect on the rights of the State. The argument that the State has settled the accounts is based upon the decision in *State of Illinois v. Illinois Central Railroad Co.* 246 Ill. 188, but there is such a substantial and material difference between that case and this as to necessarily lead to a different conclusion. In that case there was a contract between the railroad company and the State which required the company to furnish a semi-annual statement of accounts, and the Governor was authorized to verify and ascertain the accuracy of the accounts and to examine books and papers for that purpose. It was implied from the express provisions of the charter of the company that the Governor was not only to investigate the accounts but was to adjust and settle them, while in this case no such intention is manifest, either from the constitution or the statutes. Sections 20 and 21 of article 5 of the constitution provide that accounts shall be kept by officers of the executive department and a semi-annual report thereof shall be made to the Governor, under oath. Those

officers are required, at least ten days preceding the regular session of the General Assembly, to make reports to the Governor, who shall transmit the same to the General Assembly, and the Governor is authorized, at any time, to require information in writing, under oath, from such officers upon any subject relating to the condition, management and expenses of their offices. Chapter 130 of the Revised Statutes, in force July 1, 1873, provides that whenever the condition of the bond of the Treasurer is broken it shall be the duty of the Governor to order the same to be prosecuted, and there is the same provision for a biennial report as that contained in the constitution. None of these provisions can be regarded as authorizing the Governor to settle the accounts of the State Treasurer, since the Governor is neither authorized nor directed to verify or approve or settle them and the reports submitted to the Governor did not disclose the illegal payments.

It is next contended that the uniform, practical construction of the act for a long period of time, under which Rutz paid the money to himself, should prevail. That question was presented in the case of *Whittemore v. People*, 227 Ill. 453, and it was held that the language of the constitution was clear and unambiguous and did not admit of legislative or administrative construction contrary to its plain meaning. Counsel say, however, that they now present additional reasons which ought to convince us that the decision was not correct. The only additional reason offered is, that the contemporaneous construction was not alone by the Treasurer and Auditor of Public Accounts who appropriated the money to themselves, but also by the Governor and General Assembly, whose duty it was to correct any erroneous construction of the statute by which the Treasurer took money which did not belong to him. An increase in the number of public officials who disregarded the letter of the constitution, which could not be misunder-

stood by anyone, does not demonstrate that the former decision was wrong.

The next point made is, that the statute under which the money sued for was collected is unconstitutional, and the argument is based on the decisions in *Morgan v. Schusselle*, 228 Ill. 106, and other cases holding that the legislature cannot delegate the right of corporate or local taxation to any other than the corporate or local authorities of the district to be taxed, and cannot compel a municipal corporation to create a debt against its will and subject the property of tax-payers to a tax for its payment without their consent. A sufficient reply to this argument would be that it does not concern the appellants. The courts do not entertain objections to the constitutionality of an act made by one whose rights have not been affected. (*People v. McBride*, 234 Ill. 146.) If anyone would have a right to raise objections it would be the local tax-payers, and as the money was voluntarily paid by them they could not recover it back. Although appellants have no right to raise the question, it is not to be implied that the statute is unconstitutional. Local municipalities created the debts and thereby authorized the levy of taxes to pay their obligations, and the act merely provided for a calculation of the amount necessary to be raised by such taxes and the certifying of the amounts to the proper municipal authorities.

Finally, it is claimed that neglecting to file claims against the estates of Jones and Tracy released appellants to the extent that those estates should contribute to discharge the liability on the bonds. If the claim had been filed against either of those estates it would have been paid in full, and the estate paying it would have been compelled to resort to Whittemore in his lifetime or his estate after his death. No authority for the position of counsel is cited by them, and the settled rule is, that a surety is never discharged because a cause of action, either against the principal or a surety, is barred by the Statute of Limitations.

The estate of Whittemore was not released by the fact that the Statute of Limitations barred the claim against the other estates.

The judgment is affirmed.

Judgment affirmed.

HELEN KULVIE, Defendant in Error, vs. THE BUNSEN COAL COMPANY, Plaintiff in Error.

Opinion filed February 23, 1912.

1. MINES—*what does not make a coal digger a shot-firer.* The fact that a coal digger has a certificate of competency, under the act of 1908, authorizing him "to seek and accept employment as a coal miner in the mines of the State of Illinois," does not necessarily make him a "shot-firer," as meant by the Shot-Firers act of 1907, even though at the time of his injury he was engaged in firing a shot.

2. SAME—*it is not error to prove that a deceased miner was widow's sole support.* In an action by the widow, based upon the alleged willful violation of a provision of the Mines and Miners act, it is not error to permit the widow to testify that she was supported by her deceased husband and that he was her only means of support. (*Jones & Adams Co. v. George*, 227 Ill. 64, distinguished.)

3. INSTRUCTIONS—*in estimating pecuniary damages to widow the jury may consider whether there are any children.* It is not error to instruct the jury that in estimating the pecuniary damages to the widow as the direct result of her husband's death they might take into consideration whether or not deceased left any children.

WRIT OF ERROR to the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Vermilion county; the Hon. W. B. SCHOLFIELD, Judge, presiding.

H. M. STEELY, and H. M. STEELY, JR., for plaintiff in error.

KEESLAR & GUNN, and C. H. BECKWITH, for defendant in error.

Mr. JUSTICE FARMER delivered the opinion of the court :

Andrew Kulvie was killed in the Bunsen Coal Company's mine October 28, 1909, and his widow brought this suit to recover damages. The cause was tried and submitted to a jury under the third and fourth counts of the declaration. The third count alleges that Andrew Kulvie and his buddy, John Wuysik, were coal diggers in defendant's employment; that the defendant willfully failed to instruct them concerning the manner of discharging blasting shots in said mine but ordered and directed them to discharge three certain shots at a place described, but, having willfully failed to instruct said employees as to the manner of discharging said shots, they fired all three of them at the same time, as one blast, thereby causing an explosion of such force that a large quantity of coal was thrown to and upon Kulvie, instantly killing him. The fourth count alleged defendant willfully failed to instruct Wuysik, Kulvie's buddy, as to the manner of discharging shots but ordered Wuysik and Kulvie to fire three certain shots described; that by reason of the willful failure of defendant to instruct Wuysik as to the manner of firing shots he fired two of them less than one minute apart; that he fired said two shots at the same instant and while Kulvie was attending to firing the other shot; that by reason of firing said two shots at the same time, the force of the explosion was so great that it threw a large quantity of coal to and upon Kulvie, thereby causing his death. The general issue was pleaded, and a trial by jury resulted in a verdict and judgment for plaintiff for \$5000. The Appellate Court affirmed the judgment, and the case is brought here by *certiorari*.

One of the errors assigned is, that the trial court erred in refusing to direct a verdict in favor of plaintiff in error. The argument made in support of this contention is, that the deceased was a shot-firer, and the provision of the Mines act of 1899 requiring the instruction of miners as

to the manner of placing and discharging blasting shots does not apply to shot-firers under the Shot-Firers act of 1907. The declaration is based upon the theory that Kulvie was a coal digger and not a shot-firer. Clause *d* of section 16 of the Mines act of 1899 made it the duty of the mine manager to "give special attention to and instructions concerning * * * the time and manner of placing and discharging the blasting shots." In 1905 the Shot-Firers act was passed. The act was amended in 1907, and as amended provided that in all mines "where coal is blasted and where more than two pounds of powder is used for any one blast; and also in all mines in this State where gas is generated in dangerous quantities," a sufficient number of practical, experienced men, to be designated as shot-firers, shall be employed by the company and at its expense, whose duty it shall be to inspect and do all the firing of all blasts prepared, in a practical, workmanlike manner in the said mine or mines. Under that act the shot-firer is to determine for himself whether the shot is prepared in a practical and workmanlike manner, and his judgment is conclusive upon this question.

Plaintiff in error insists that the provision of the Mines act requiring the mine manager to give instructions as to the manner of firing shots does not apply to shot-firers, and that under the proof the court should have held, as a matter of law, that Kulvie was a shot-firer and should have directed a verdict in its favor. The declaration alleged that both Kulvie and his buddy were employed as coal diggers. The proof of defendant in error tended to show Kulvie had been working in mines about three years before his death. A certificate issued to him by the miners' examining board under the act of 1908 stated he had worked in coal mines, "at the face, for not less than two years." He and his buddy, Wuysik, worked for plaintiff in error on the night shift, digging coal, for about two months before the accident. They began work at nine o'clock. Six or eight days

before Kulvie's death he and Wuysik were directed by the assistant mine manager to fire the shots prepared by the miners during the night, before coming out of the mine. They were told they would be paid the union scale,—fifty-three cents an hour,—for firing shots, and be allowed three hours' time for doing the work although it occupied only about a half hour's time. They would dig coal until four o'clock in the morning and then go and fire the shots that had been prepared. On the morning of Kulvie's death three shots had been prepared in the pillar of coal between the end of room 17 and the fifth east entry off the main south entry in said mine, and he and Wuysik went to discharge them. Wuysik testified there were four shots at said place, but the proof seems to show he was mistaken in this and that there were only three. He testified that when they came to the place where the shots were prepared he was to fire two and Kulvie the others; that when he was ready to light the fuse he inquired of Kulvie if he was ready, and Kulvie answered "ready;" that he lighted two of the shots, then ran into a room and waited a few seconds until they exploded, and that there were two explosions, about a minute apart. After the explosions Wuysik called Kulvie, but receiving no answer went to look for him and found his lifeless body under the coal. It did not appear from the pleadings or proofs that the mine of plaintiff in error was of the class requiring the employment of shot-firers though there is proof that shot-firers were employed, and the proof of the defendant in error tends to show Kulvie and Wuysik were not shot-firers within the meaning of the statute, but were employed for and were engaged in digging coal. Only a small number of men were employed at night in digging coal and but few shots were prepared for firing before the day shift went to work. Wuysik testified he had never fired shots before doing so at the direction of the assistant mine manager, for six or eight days before Kulvie's death, and was unable to tell a good shot from a bad

one. One witness for plaintiff in error testified Kulvie had fired his own shots in other mines before the Shot-Firers act became a law, but neither Kulvie nor Wuysik had any opportunity to examine the holes prepared for the charge or to know anything about how the shots were prepared, except from such inspection as they were able to make when they went to fire them, and no instructions were given them as to the manner of firing shots.

We do not think the fact that Kulvie had a certificate of competency, under the act of 1908, authorizing him "to seek and accept employment as a coal miner in the mines of the State of Illinois," necessarily authorized designating him as a shot-firer, as contended by plaintiff in error. The law under which Kulvie's certificate was issued provided that a certificate issued thereunder should entitle the holder "to be employed as and to do the work of miners as may be expressed in said certificate." The certificate issued to Kulvie authorized him to seek and accept employment "as a coal miner." The act of 1908 was amended in 1909, and as amended the certificate issued by a miners' examining board is not required to state that the holder was authorized to be employed to do the work of a miner, "as may be expressed in said certificate." The act of 1909 provides that certificates shall be issued to applicants found qualified upon examination, and such certificate shall entitle the holder "to be employed as and do the work of miners." The certificate is evidence that the holder possesses the qualifications "to do the work of miners," but does not necessarily show that he possesses the practical experience required of a shot-firer. Notwithstanding Kulvie's certificate, there is proof in the record tending to show he did not possess such knowledge and experience. The mine manager of plaintiff in error testified that Charles Rucker was night boss and assistant to him, and had been working in that capacity in the mine more than a year before the accident. Rucker testified he directed Kulvie and Wuysik

to fire the shots prepared by the night shift; that they had been working under him about two months before the accident and he thought them competent men. Neither Rucker nor the mine manager claimed to know, from observation, anything about the skill of the two men. Rucker testified he had never seen either of them fire a shot, and had no knowledge of their ever having fired any until they did so at his direction. The Appellate Court expressed the view that the proof created the impression that the direction to Kulvie and Wuysik to fire shots was done with a view to escape the expense that would have been required if practical and experienced men had been designated as shot-firers to do the work, as required by the statute, and we think this warranted by the evidence. The proof of defendant in error tended to establish the allegations of the declaration that Kulvie was a coal digger,—not a shot-firer. The trial court instructed the jury to find for plaintiff in error if they believed, from the evidence, deceased and Wuysik were shot-firers at the time of the accident. Under the proof the court properly refused to direct a verdict, and rightly submitted to the jury the question whether defendant in error had proven, by a preponderance of the evidence, the allegations of her declaration that they were coal diggers. The weight and sufficiency of the evidence are not open now to review in this court.

Defendant in error was asked by her counsel as to the amount of wages earned by her husband, what he did with them and how many children they had. She testified the husband supported his family with his earnings and that the family consisted of herself and two children. She was asked by her counsel how old the children were, and testified they were seven and five years old. She was then asked, "What did Andrew Kulvie do with the money that he earned in the coal mine?" She answered, "We used it to live on and clothe on." She was then asked, "Did you have any other means of support?" This was objected to

by counsel for the plaintiff in error, but the objection was overruled and the witness answered that she had no other means of support. Counsel for plaintiff in error moved that the question and answer be stricken. The motion was allowed and both question and answer were stricken out. Thereupon counsel for defendant in error moved the court to strike the question as to what was done with the money earned by Kulvie in the mine, and the answer thereto. The motion was allowed and the question and answer were stricken. Plaintiff in error insists proof that defendant in error had no other means of support than the earnings of her husband was incompetent, and that the error committed in permitting the question to be answered was not cured by the ruling of the court in striking it out.

It has always been held competent, in cases of this character, to prove that the widow was supported by her husband. (*St. Louis, Peoria and Northern Railway Co. v. Dorsey*, 189 Ill. 251; *Brennen v. Carterville Coal Co.* 241 id. 610.) In *Pennsylvania Co. v. Keane*, 143 Ill. 172, the widow was permitted to testify, over objection, that her deceased husband was at the time of his death her sole support. The court, after reviewing a number of previous decisions, announced its conclusion as to the correct rule in the following language: "It cannot well be said that proof that the wife or next of kin of the deceased were, at and before the time of his decease, dependent upon him for support, or that he was her or their sole support, is wholly immaterial and irrelevant to any point at issue in the case. We therefore conclude that there was no error in overruling the objection made in that regard to the evidence." While the question in that precise form, so far as we can find, was not involved in any of the subsequent cases, *Pennsylvania Co. v. Keane*, *supra*, has been repeatedly cited, on the point mentioned, in subsequent decisions, and in some of them the language above quoted has been quoted with approval, and the case has never been overruled. In

Preble v. Wabash Railroad Co. 243 Ill. 340, it was said: "It was proper to prove that John E. Aiten was the sole support of his widow at the time of his death, and that was the effect of the statement that the widow was dependent upon her husband for support," and *Pennsylvania Co. v. Keane*, *supra*, and other cases, are cited in support of the statement. It will be observed that the question and answer objected to did not relate to the poverty or helplessness of the widow and family after the death of the husband. Such proof has been held to be incompetent, but the question only called for an answer whether, at the time of Kulvie's death, they had any other means of support. The question here is distinguishable from the question decided in *Jones & Adams Co. v. George*, 227 Ill. 64, and similar cases, where it was held incompetent to permit an injured person suing in his own name for damages, to prove that he had a wife and children dependent upon him for support.

Some other objections are made to the rulings of the court in the admission and exclusion of evidence, but we do not regard them of sufficient importance to require special mention. It is sufficient to say that in our opinion no substantial error was committed by the court in the admission and exclusion of evidence offered.

Complaint is made of certain instructions given on behalf of defendant in error. The first instruction told the jury that in assessing the damages sustained by the plaintiff they should allow such pecuniary damages as were the direct result of the death of her husband, and in making the estimate of such damages they might take into consideration whether or not deceased left surviving him, in addition to the widow, any children. This instruction was approved in *Beard v. Skeldon*, 113 Ill. 584. The other instructions complained of were based upon the allegations of the declaration and the theory of defendant in error's case that Kulvie and Wuysik were coal diggers and not

shot-firers, and that if the jury believed this was proven by a preponderance of the evidence, and that Kulvie's death resulted from the willful violation of the statute, as claimed, then they should find the defendant guilty, and that whether Kulvie was guilty of contributory negligence could not be considered as a defense. The instructions did not assume that Kulvie was not a shot-firer but a coal digger. That question was fairly left to the jury. The jury were fully instructed upon defendant's theory of defense, and were told that if they believed, from the evidence, that Kulvie and Wuysik were at the time of the accident shot-firers they should find the defendant not guilty. There is no conflict or inconsistency between the instructions given for defendant in error and those given for plaintiff in error.

Complaint is made of remarks by counsel for defendant in error in argument to the jury. One of her counsel stated that the suit was for the recovery of damages and the amount claimed in the declaration was \$10,000. Counsel for plaintiff in error objected to this statement. The court sustained the objection and the counsel who made it withdrew it. Another one of defendant in error's counsel stated to the court that there were no decisions holding it improper to tell the jury, in argument, the amount sued for in the declaration, but that the decisions only held it improper to do so in an instruction. This statement was objected to, but no ruling was made upon it. We do not think the statement made was an improper one. The question here is not similar to the question passed upon in *Illinois Central Railroad Co. v. Souders*, 178 Ill. 585. But if the statement had been improper, in view of the action of the court in sustaining an objection to it and the withdrawal of the statement by counsel it would not require a reversal of the judgment.

The judgment is affirmed.

Judgment affirmed.

THE CITY OF CHICAGO, Appellee, vs. C. P. TERWILLIGER,
Appellant.

Opinion filed February 23, 1912.

1. SPECIAL ASSESSMENTS—*when variance must be regarded as both willful and substantial.* Where the engineer's estimate of cost is for a two-foot brick sewer but the ordinance provides for a two-and-one-half-foot brick sewer the variance is substantial, and, in the absence of evidence explaining it, must be regarded as willful, in the sense of intentional.

2. SAME—*material difference between work estimated and work provided for in ordinance is substantial.* The engineer's estimate is the basis for the assessment, and if there is a material difference between the work included in the ordinance and that included in the estimate there is a substantial variance, whether the work included in the ordinance is more or less than is estimated.

APPEAL from the Superior Court of Cook county; the Hon. THEODORE BRENTANO, Judge, presiding.

GEORGE A. MASON, (WILLIAM T. HAPEMAN, of counsel,) for appellant.

PHILIP J. MCKENNA, and FRANK JOHNSTON, JR., (WILLIAM H. SEXTON, Corporation Counsel, of counsel,) for appellee.

Mr. JUSTICE DUNN delivered the opinion of the court:

To a petition for the levy of a special assessment for the construction of a sewer the appellant objected that there was a willful and substantial variance between the engineer's estimate of cost and the ordinance, in that the estimate itemized the cost of a two-foot brick sewer, whereas the ordinance provided for a two-and-a-half-foot brick sewer. The objection was overruled, and this appeal is from the judgment confirming the assessment.

The record shows the variance, but section 9 of the Local Improvement act provides that it shall not affect the

validity of the proceedings unless the court shall deem it willful or substantial. There is no evidence in the record, but it would not seem to require either evidence or argument to sustain the proposition that a change which increases the diameter of a sewer one-fourth is substantial. On the other hand, so palpable and material a variance between the ordinance and the estimate on which it was based would seem, in the absence of evidence explaining it, to be willful, which we have held to be equivalent to intentional. (*Clarke v. City of Chicago*, 185 Ill. 354; *Smith v. City of Chicago*, 214 id. 155.) The estimate is the basis of the assessment, and if there is a material difference between the work included in the ordinance and that included in the assessment the variance is substantial. (*Chicago Terminal Transfer Railroad Co. v. City of Chicago*, 184 Ill. 154; *Wetmore v. City of Chicago*, 206 id. 367; *Gardner v. City of Chicago*, 224 id. 254; *Smith v. City of Chicago*, *supra*.) It is equally a substantial variance whether the work included in the ordinance is more or less than that included in the estimate. If less work is included in the ordinance than in the estimate then the property will be assessed for work not intended to be done and the assessment will be too high, while if more work is included in the ordinance than in the estimate the result will probably be a deficiency, for which a supplemental assessment will be made, with the same effect on the property owner as if there had been an arbitrary increase in the estimated cost after the public hearing, which we have held cannot be allowed. *City of Chicago v. Wilder*, 184 Ill. 397.

The judgment is reversed and the cause remanded, with directions to sustain the appellant's objection.

Reversed and remanded, with directions.

AMY ELLIS, Appellant, vs. R. H. FLANNIGAN *et al.*
Appellees.

Opinion filed February 23, 1912.

1. WILLS—it is not essential that testatrix actually see the witnesses sign. If the attesting witnesses sign the will at a place within the scope of the vision of the testatrix, and where, considering her position and state of health at the time, she might have seen the signing if she so desired, the will is sufficiently attested in her presence even though she may not have actually seen the witnesses sign.

2. EVIDENCE—when a photograph of scene of attestation is not admissible. In a will contest case, where the contestant claims the will was signed at a table so far behind the testatrix that she could not have seen the attesting witnesses sign, a photograph of the room, taken some four weeks after the death of the testatrix, with the furniture arranged by a person who was present at the attestation of the will, assisted by the contestant, who would be sole heir to the property if the will were set aside, is not admissible.

APPEAL from the Circuit Court of Franklin county;
the Hon. WILLIAM H. GREEN, Judge, presiding.

B. W. POPE, and G. A. HICKMAN, for appellant.

SPILLER & MILLER, and CANTRELL & WILLIAMS, for appellees.

Mr. JUSTICE COOKE delivered the opinion of the court:

The circuit court of Franklin county, on appeal from the judgment of the county court, entered an order admitting to probate the last will and testament of Sarah A. Hudson, deceased, and directing that letters testamentary issue to appellees. From that judgment appellant has prosecuted this appeal.

The only question presented for our consideration is whether the will in question was properly attested in the presence of the testatrix. Mrs. Hudson executed her will

a few days before her death. At that time she was suffering from dropsy of the heart, and for some time prior to the execution of the will it was impossible for her to lie down. As a result she was kept in a sitting position in an armchair, which she occupied both day and night. While she had sufficient strength to move her feet and arms, and her body to some extent, it appears from the evidence that she was not able to move the position of the chair which she occupied. The will was witnessed by Carl Burkhardt, cashier of a bank at Benton, and William B. Martin, an insurance and real estate agent. At the time of the execution and attestation of the will no one was present except Mrs. Hudson, Burkhardt and Martin. Burkhardt and Martin having been summoned for the purpose of witnessing the will, found Mrs. Hudson seated in her chair, facing a little north of east and about opposite the south side of a four-foot window which was in the center of the east side of the room. The room was fourteen feet north and south by sixteen feet east and west. In about the center of the room, which would be behind and to the left of Mrs. Hudson as she was sitting at the window, was a round table five and one-half feet in diameter. Both of these witnesses testified that after they had entered the room and conversed awhile with Mrs. Hudson she produced the will and executed it by placing it on a magazine which she held on her knee. She then handed it to one of them and they turned to the table, where they attached their signatures to the instrument. They both testify that while attesting the will they sat at the easterly or southeasterly part of the table, and that Mrs. Hudson sat in her chair, with her left side toward them. While neither could remember whether she actually observed them while they were in the act of signing as witnesses, they both testify that she could have done so by merely turning her head to the left and looking over her shoulder, and that they were so close to her that she could have reached out her

left hand and placed it on that part of the table where the will was attested, and that during that time Mrs. Hudson frequently turned her head in the direction of the witnesses as they sat at the table.

It is clearly shown from the testimony of these two witnesses that every requirement of the proper attestation of a will was complied with. The only evidence offered to contradict them was the testimony of Molly Cunningham, a sister of appellant. She and appellant both resided with Mrs. Hudson, and she was familiar with the arrangement of the room at the time the will was attested. It was she who had admitted Burkhart and Martin when they called to attest the will. She testified as to the position of Mrs. Hudson's chair in the room and as to the position of the table upon which the will was attested, and from her testimony it would appear that the table was almost, if not quite, directly behind the chair in which Mrs. Hudson was sitting. From the testimony of all the witnesses it is apparent that Mrs. Hudson could not, by turning her head and body, see any object which was directly behind her, as the back of the chair extended as high, if not higher, than the top of her head. To support the testimony of this witness a photograph of the room was offered and admitted in evidence. She testified that this photograph was taken about four weeks after the death of Mrs. Hudson. It shows the table, and the chair in which Mrs. Hudson sat, arranged, as the witness testified, in the relative positions which they occupied on the day the will was attested. Witness further testified that her sister, the appellant, assisted her in arranging the furniture in the position which she claimed each piece occupied on the day of the execution of the will. Appellant was the adopted daughter of Mrs. Hudson, and should the probate of the will be denied would inherit all of her property. The photograph taken under these circumstances was not competent and should not have been admitted.

From a consideration of all the evidence it appears that the will was properly attested in the presence of Mrs. Hudson. It was not necessary that the testatrix should actually have seen the witnesses sign, but to have been attested in her presence the will must have been signed at a place within the scope of her vision, and where, considering her position and the state of her health at the time, she might have seen the signing had she so desired. *Witt v. Gardiner*, 158 Ill. 176; *Drury v. Connell*, 177 id. 43; *Calkins v. Calkins*, 216 id. 458.

As all the necessary conditions existed, the judgment of the circuit court admitting the will to probate was proper and is affirmed.

Judgment affirmed.

HANNAH L. MARTIN *et al.* Appellees, *vs.* THE MODERN WOODMEN OF AMERICA, Appellant.

Opinion filed February 23, 1912.

1. WORDS AND PHRASES—the word “child” does not include a grandchild. The word “child,” in both popular and legal significance, means a son or daughter,—a descendant in the first degree,—and does not include a grandchild; and the word will not be extended to include a grandchild unless there is something in the instrument showing an intention to use the word in an extended meaning, or unless it is necessary to give such extended meaning in order to render the instrument effective.

2. BENEFIT SOCIETIES—a beneficiary has no vested right in contract between the member and society. In Illinois the beneficiary named in a benefit certificate has no vested right or interest in the contract between the member and the society which will pass by descent.

3. SAME—benefit certificate is not a testamentary disposition of property of member. A benefit certificate speaks from the death of the member holding it, but it is not a testamentary disposition of the property of the holder, as the property does not become a part of his estate and is not subject to payment of debts or cost of administration.

4. SAME—*section 11 of Statute of Descent cannot be applied, generally, to benefit certificates.* Section 11 of the Statute of Descent cannot be applied, generally, to benefit certificates, since if it were so applied the shares of children who die childless would by the terms of the statute become intestate property.

5. SAME—*a benefit certificate in favor of children does not embrace grandchildren.* A benefit certificate in favor of the widow of the member and his children does not embrace the children left by a child who was alive when the certificate was issued but who predeceased the member.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Logan county; the Hon. T. M. HARRIS, Judge, presiding.

TRUMAN PLANTZ, NORTHCOTT & ORR, and E. S. SMITH,
for appellant.

KING & MILLER, for appellees.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

This is a suit by appellees, Hannah L. Martin, widow, and C. C. Martin, Earl Martin and M. F. Martin, children of F. M. Martin, deceased, commenced in the circuit court of Logan county, against appellant, the Modern Woodmen of America, upon a benefit certificate issued to said F. M. Martin for the sum of \$1000, payable at his death to "Hannah L., wife, and children." The defense was that all the beneficiaries under the certificate were not made plaintiffs, and it was based on the fact that F. M. Martin, the holder of the certificate, had a daughter who died prior to his death, leaving two children, who were minors and non-residents of the State. It was claimed that these grandchildren had an interest in the fund and that the plaintiffs were not entitled to recover the whole amount. A jury having been waived the cause was tried by the court, and

the court held propositions of law that the word "children" did not include grandchildren and the two grandchildren were not beneficiaries under the certificate, and refused to hold propositions that the grandchildren were included. The court rendered judgment for \$1025 and costs, and an appeal from the judgment was taken to the Appellate Court for the Third District. The Appellate Court affirmed the judgment and granted a certificate of importance and an appeal to this court.

The amount named in the certificate was payable at the death of F. M. Martin to his wife, Hannah L., and his children, who were each entitled to an equal share of the fund, and the disputed question is whether the grandchildren were included in the description of the beneficiaries. The word "child," in its popular signification, means a son or daughter; a descendant in the first degree; (Webster's Int. Dict. ;) and the legal meaning of the word is the same as the popular one and does not include a grandchild. The word "children" is never extended to include grandchildren, in the absence of something in the instrument in which the word is employed showing the intention to use it with such an extended meaning or where it is necessary to render the instrument effective. (*Arnold v. Alden*, 173 Ill. 229; 7 Cyc. 125; 5 Am. & Eng. Ency. of Law,—2d ed.—1085.) There is nothing in the context of the certificate which would justify us in giving any other than the natural and usual meaning to the word "children," and it was regarded as having that meaning, where similar questions were involved, in *Windsor v. Odd Fellows Benevolent Ass'n*, 13 R. I. 149, and *Elgar v. Equitable Life Ins. Ass'n*, 88 N. W. Rep. (Wis.) 927. The court of appeals of Kentucky held that grandchildren were included as beneficiaries under a certificate payable to children, in *Supreme Council Catholic Knights of America v. Densford*, 49 L. R. A. 776. In that case the member procured a certificate payable to his three named daughters, one of whom

died before his death, leaving children, and the court was of the opinion that the daughter who died was vested, by the terms of the certificate, with a definite interest in the fund, which would be due at the death of her father and which descended to her children. That conclusion does not agree with the rule in this State that the beneficiary in a certificate has no vested right or interest in the contract between the member and the benefit society. (*Delaney v. Delaney*, 175 Ill. 187; *Voigt v. Kersten*, 164 id. 314.) Under our law there was no vested interest which would pass by descent. A further basis for the decision was the Statute of Descent of Kentucky, providing that if the devisee or legatee dies before the testator, or is dead at the making of the will, leaving issue who survive the testator, such issue will take the estate devised or bequeathed as the devisee or legatee would have done if he had survived the testator, unless a different disposition is made or required by the will. The certificate was regarded as testamentary in character and the statute was applied. But we cannot apply our Statute of Descent or hold that a certificate is a testament. The benefit certificate speaks from the death of the holder of the certificate, but it is not a testamentary disposition of property of the holder, since the property does not become a part of his estate and is not subjected to payment of debts or costs of administration. Section 11 of the Statute of Descent could not be applied, generally, to cases of benefit certificates, because if it were, the shares of children who should die childless would by the express terms of the statute be intestate property.

There is no ground upon which we are able to include the grandchildren as participants in the fund, and we think that the court was right in holding and refusing the propositions of law.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

THE CITY OF CHICAGO, Appellee, vs. STELLA R. DAVIS
et al. Appellants.

Opinion filed February 23, 1912.

1. SPECIAL ASSESSMENTS—*resolution need not describe improvement with the particularity required in ordinance.* The resolution of the board of local improvements (which must include the estimate of the engineer) need not describe the improvement with the particularity required in the ordinance, and it is not necessary that the ordinance itself shall set out every detail.

2. SAME—*inclusion, in estimate, of work not needed does not render entire proceeding void.* The fact that the engineer's estimate calls for a gross sum for "adjusting sewer man-holes and catch-basins and constructing and connecting catch-basin inlets," whereas there are, in fact, no sewer man-holes to be adjusted, does not render the entire proceeding void, as such matter is a mere minor detail not materially affecting the improvement.

3. SAME—*fact that item of estimate is too high is not a valid objection.* The fact that an item of the engineer's estimate is too high is not an objection which may be urged against the confirmation of the assessment in the absence of fraud or mistake in the making of such estimate, as property owners, after the improvement is completed, cannot be compelled to pay more than its actual cost.

APPEAL from the Superior Court of Cook county; the Hon. THEODORE BRENTANO, Judge, presiding.

GEORGE A. MASON, and EDWARD C. HIGGINS, (WILLIAM T. HAPEMAN, of counsel,) for appellants.

PHILIP J. MCKENNA, and EUGENE H. DUPEE, (WILLIAM H. SEXTON, Corporation Counsel, of counsel,) for appellee.

Mr. CHIEF JUSTICE CARTER delivered the opinion of the court:

This is an appeal from a judgment of the superior court of Cook county overruling certain legal objections and confirming an assessment for paving with creosoted

wooden blocks East Sixty-third street from South Park avenue to Cottage Grove avenue, in Chicago.

The sole question urged here is, that the trial court should have sustained the objection to the estimate of the engineer as to the following item: "Adjusting sewer man-holes and catch-basins and constructing and connecting catch-basin inlets, \$1621." Oral proof offered on the hearing showed that all the sewer man-holes in the portions of the street in question are in the street railroad right of way, the paving of which is excepted from the ordinance. It appears from evidence offered by appellants that there were catch-basins in the proposed improvement in need of adjustment and catch-basin inlets to be constructed. It is argued that the estimate of the engineer is excessive and void because it specifies the adjusting of sewer man-holes, when, in fact, there were no such man-holes to be adjusted. The estimated cost of the entire improvement is \$38,500. Manifestly, the estimated cost for adjusting sewer man-holes is very small as compared with the cost of the entire improvement, and, indeed, it must be necessarily small as compared with the one item objected to. This court has repeatedly said that the statute does not require that an improvement ordinance should set out every detail of the improvement, (*City of Chicago v. LeMoyné*, 243 Ill. 379, and cases cited,) and that it is not necessary that the resolution passed by the board of local improvements (which must include the estimate of the engineer) describe the improvement with the same particularity as it is required to be described in the ordinance. (*Hulbert v. City of Chicago*, 213 Ill. 452, and cases cited.) We said in *Mead v. City of Chicago*, 186 Ill. 54, that no rational engineer would include in his estimate the building of combined curbs and gutters across streets in the city of Chicago even though the estimate apparently included it. The same can be said with reference to this objection to the estimate requiring the adjustment of sewer man-holes when it turns

out there is no such work to be performed. The inclusion of the adjustment of sewer man-holes in the engineer's estimate does not render the whole proceeding void. In addition to the authorities already cited, the following also support this conclusion: *Lyman v. Town of Cicero*, 222 Ill. 379; *Rollo v. City of Chicago*, 187 id. 417; *Town of Cicero v. Skinner*, 220 id. 82; *Chicago Consolidated Traction Co. v. Village of Oak Park*, 225 id. 9.

Such authorities as *City of Chicago v. Nodeck*, 202 Ill. 257, and *Doran v. City of Murphysboro*, 225 id. 514, relied upon by appellants to sustain this objection, are not in point. The objections in those cases referred to items of the estimate that made up substantial component elements of the proposed improvement. Here the objection only refers to a mere minor detail, and does not affect, materially or essentially, the proposed improvement.

Proof was offered tending to show that the cost of adjusting the catch-basins and constructing and connecting catch-basin inlets would only be from \$384 to \$448, and it is objected that this item of the estimate is so grossly excessive as to render the assessment void. The actual cost of a public improvement cannot be estimated with absolute accuracy before the work is actually done. The best estimate will generally prove either too low or too high. (*City of Chicago v. Noonan*, 210 Ill. 18; *City of Nokomis v. Zepp*, 246 id. 159.) To compel the city, when objections are made on the ground that estimates are excessive, to go into a general hearing involving the price of labor and materials and the various conditions which might enhance or lessen the cost of the improvement, would be to construe the local improvement statute in a way not contemplated by the legislature and lead to much vexatious and unnecessary litigation. (*Connecticut Mutual Life Ins. Co. v. People*, 172 Ill. 31.) In the absence of fraud or mistake on the part of those appointed by law to estimate the cost of the improvement, the property owner cannot interpose as a de-

fense that the actual cost will be less than the estimated cost. (*Danforth v. Village of Hinsdale*, 177 Ill. 579.) There was no attempt to prove here that the engineer of the board of local improvements made a mistake or acted fraudulently in making the estimate of the item in question. After the work is completed according to the ordinance the property owners will not be compelled to pay more than its actual cost. *People v. McWethy*, 177 Ill. 334; *City of Peoria v. Smith*, 232 id. 561.

The judgment of the superior court will be affirmed.

Judgment affirmed.

FRANK A. WIMBUSH *et al.* Appellees, *vs.* JANE M. WIMBUSH *et al.* Appellants.

Opinion filed February 23, 1912.

1. WILLS—*the entire will must be taken into consideration.* In construing a will the entire will must be taken into consideration, and a construction should not be adopted which will, without reason, eliminate a large portion of the instrument.

2. SAME—*when will should be construed as creating trust estate in widow and not an absolute fee.* Even though the first paragraph of a will, standing alone, vests the widow with an absolute fee, yet if a subsequent paragraph clearly shows that the testator's intention was to create a trust estate for the benefit of the widow and his children, including those by a former wife, the will should be construed as creating such trust estate and not as giving the widow an absolute fee.

CARTER, C. J., dissenting.

APPEAL from the Circuit Court of Marion county; the Hon. THOMAS M. JETT, Judge, presiding.

JAMES M. DILL, and KAGY & VANDERVORT, (W. F. SMITH, of counsel,) for appellants.

NOLEMAN & SMITH, and W. F. BUNDY, for appellees.

Mr. JUSTICE HAND delivered the opinion of the court:

This was a bill in chancery filed in the circuit court of Marion county by Frank A. Wimbush, John H. Wimbush, Thomas Wimbush and Maud K. Linberg, the children of John Wimbush, deceased, by his first wife, against Jane M. Wimbush, his widow, and Fannie J. Wimbush and Nelson R. Wimbush, his children by said Jane M. Wimbush, for a construction of the will of John Wimbush, deceased. Jane M. Wimbush and Fannie J. Wimbush filed an answer to the bill and Nelson R. Wimbush answered the bill by his guardian *ad litem*, and a replication was filed, and the court entered a decree, in which it was held that Jane M. Wimbush took title to all of the lands of which John Wimbush died seized in the State of Illinois and of the personal property of which he was possessed, in trust, with the absolute power of sale, for the use of herself and the six children of said John Wimbush, deceased, in equal parts, with the exception of a bequest of \$200 to each of said children. From that decree Jane M. Wimbush and Fannie J. Wimbush have prosecuted an appeal to this court, and they contend in this court that Jane M. Wimbush took the entire estate in Illinois of said John Wimbush, deceased, absolutely, under the terms of his will, with the exception of the sum of \$1200, which the will provided should be paid, in equal amounts, to each of the six children of said John Wimbush, deceased, and which bequests have been paid.

The will of John Wimbush, deceased, omitting the formal parts, reads as follows:

"To my wife, Jane M. Wimbush, I give, devise and bequeath all my property, estate and effects, real and personal or mixed, of whatsoever kind, character or description and wheresoever situated.

"I appoint my said wife, Jane M. Wimbush, my sole executrix herein, and I direct that as such she give no bond. I direct, as such trustee, the said wife, Jane M. Wimbush, while not re-married, give no bond for said trust estates

of said minors born of marriage. I invest my said executrix, Jane M. Wimbush, as such and without bond, with full and absolute discretion, capacity, authority and power to sell, grant, convey and deliver, in such manner, on such terms and at such prices as said executrix may elect, all or any part of my estate, real, personal or mixed, and to make perfect record title thereto and create perfect ownership thereof, all absolutely and forever, the same as I could do if living, and to collect and re-invest the proceeds thereof or any insurance thereon for the benefit of herself and said children named hereafter, Frank A. Wimbush, John H. Wimbush, Maud K. Linberg, Thomas Wimbush, being children of my former wife, Julia A. Wimbush, who died July 29, A. D. 1886, also my children of my present wife and executrix of this will, (Jane M. Wimbush,) Fannie J. Wimbush and Nelson R. Wimbush, with the exception of an allowance of two hundred dollars (\$200) which I bequeath to each of my children named hereafter, to be paid within two years after my death by my said wife and executrix, Jane M. Wimbush: Frank A. Wimbush, John H. Wimbush, Thomas Wimbush, Fannie J. Wimbush, Nelson R. Wimbush and Maud K. Linberg. The balance of my estate to be handled as above stated by my wife and executrix, Jane M. Wimbush. I hereby nominate my said wife, Jane M. Wimbush, the executrix of this my last will and testament, and I hereby request that she be not required to give bond for the faithful discharge of the trust hereby reposed in her as such executrix."

It is clear from the first paragraph of the will of John Wimbush, deceased, hereinbefore set out, that Jane M. Wimbush would take the entire estate of John Wimbush, real, personal and mixed and wheresoever situated, if that paragraph of the will were not limited or controlled by the succeeding paragraph of the will. When, however, the two paragraphs are read together, it is clear Jane M. Wimbush is not given the entire estate but that she takes the same as trustee. The law is well settled that in construing a will all the provisions of the will must be taken into consid-

eration. If, therefore, the contention of the appellants be sustained and it be held that Jane M. Wimbush takes the entire estate, this well settled rule of construction must be disregarded, as to reach such conclusion the second paragraph of the will must be entirely eliminated from the will. We do not see why this should be done. We are of the opinion, when the entire will is read, that it is clear that it was the intention of the testator that Jane M. Wimbush should hold the testator's land and personal property in trust for the benefit of herself and the six children of the testator, in equal parts, with the exception of the bequests to be paid to his children, and that Jane M. Wimbush should have the right to sell his estate, or any part thereof, for the benefit of herself and the testator's children. To hold that the testator intended to give to Jane M. Wimbush his entire estate, with the exception of the six small bequests to his children, would be to eliminate the portions of the will which were clearly intended by the testator to impress a trust upon his estate, in the hands of Jane M. Wimbush.

We recognize the rule that when a testator by his will creates a fee, the fee will not be cut down to a lesser estate by a subsequent provision of the will unless the subsequent provision is clear and unambiguous. We think, however, if we give that rule its fullest force it is apparent from the reading of this will as a whole that the language of the subsequent paragraph of the will limits the estate created by the will and creates in Jane M. Wimbush a trust estate, and not an absolute fee. The second paragraph of the will is free from ambiguity and in construing the will it cannot be disregarded.

We are of the opinion, therefore, the circuit court properly construed the will of John Wimbush, deceased, and that the decree entered by that court should be affirmed.

Decree affirmed.

Mr. CHIEF JUSTICE CARTER, dissenting:

I do not agree with the construction of the will given in the foregoing opinion. In construing wills the true intention of the testator must be sought for and enforced, and to ascertain this intention the whole instrument and all of its parts should be considered. Whenever it can possibly be done, a will should be so construed as to give effect and operation to every word and provision in it. (*Welsch v. Belleville Savings Bank*, 94 Ill. 191; *Markillie v. Ragland*, 77 id. 98; *Boyd v. Strahan*, 36 id. 355.) A later clause of a will, when repugnant to a former provision, will be considered as intended to modify or restrict the former. (*Brownfield v. Wilson*, 78 Ill. 467; *Morrison v. Schorr*, 197 id. 554.) No particular forms of words are necessary for the creation of trusts, and the words "in trust" are not essential. However, some language, unequivocal in character, is required from which an intention to raise a trust can be attributed to the testator. (*Dee v. Dee*, 212 Ill. 338.) The intention must be clear, though the existence of the trust may be inferred from the powers and authority given to the executors or trustees. (Pomeroy's Eq. Jur. secs. 1009, 1011.) Whether a trust has been created in any particular case is a question of interpretation and construction. The most common and important species of trusts by inference is composed of those where the property is given to a devisee or legatee, accompanied by precatory words or phrases,—that is, words or phrases expressing direction, entreaty, confidence, hope, expectation, wish or request, implying the testator's desire that the property should be used for the benefit of a certain designated person or persons or certain purposes. Without question, a trust may be thus imposed upon the subject of a devise, but an intent to create the trust must clearly appear. If the intention be doubtful, precatory words will not be construed as a trust. (Pomeroy's Eq. Jur. sec. 1016; *Giles v. Anslow*, 128 Ill. 187, and authorities cited.) Pri-

vate trusts, which concern individuals, must be certain and the individual or individuals must be identified. (Perry on Trusts,—6th ed.—sec. 23.) Courts of equity can carry into effect only such trusts as are of a certain and definite character. Even though the parties are certain, if the terms by which the trust is created are so uncertain or indefinite that its objects cannot be clearly ascertained the trust must fail. (2 Story's Eq. Jur.—13th ed.—sec. 979a.) The words relied upon in this will to create and regulate the trust are vague and indefinite. It is contended that the executrix is to dispose of the property and collect and re-invest the proceeds. But is this process to continue for one year, or during the lifetime of the executrix, or until the children reach a certain age? All the children except one were of age when this litigation was instituted. When and how is final distribution to be made? The courts can not make a will or declare a trust. The intention to be sought for in the interpretation of a will is not that which may have existed in the mind of the testator, but that which he expressed by the language of the will. (*Engelthaler v. Engelthaler*, 196 Ill. 230.) Manifestly, the testator did not intend that the distribution should be made at once after his death, because he directed the wife to re-invest the proceeds. When the will contemplates a distribution subsequent to the death of the testator the time must be fixed by the will itself. It cannot be left open, to be determined by the executor or trustee. (*McCartney v. Osburn*, 118 Ill. 403.) If the language of the will as to the trust,—either as to the subject matter, the beneficiaries, the nature and quantity of their interest or the manner in which the trust is to be performed,—is so vague, general or equivocal that any one of these necessary elements is left in real uncertainty the trust must fail. (*Orr v. Yates*, 209 Ill. 222.) An appointment of the testator's wife as his attorney and executrix, "to take charge of my property after my death, and retain or dispose of the same for the benefit of herself

and children," creates no trust. Beach on Wills, sec. 219, and cases cited.

While the purpose of the testator as expressed in the language of the will is not clear, I am disposed to think, in view of all the language used, that the most reasonable construction is that the testator intended to give each of his children only a two-hundred-dollar legacy; that while he did use the words "trustee" and "trust estates," no such estate was created by the will. His confidence in his wife is shown by his giving her unlimited discretion in the management of the property. Had it been his purpose to create a trust he would have used language sufficient for that purpose. Taking the entire will together, I think the testator intended to give his wife the property, but to impress upon her his wish that it should be used for the benefit of herself and his six children.

There is another reason, moreover, that supports this view as to the construction of the will. Under the first paragraph of the will, considered alone, the conclusion is necessary that by section 13 of our statute on conveyances (Hurd's Stat. 1909, p. 524,) the wife takes a fee simple estate of inheritance in all the lands in this State of which the testator died seized. The only question, then, that can arise in the construction of this will is, does the subsequent language cut down this fee granted by the first clause? It has frequently been stated that if either real or personal property is given absolutely to a legatee or devisee a limitation over is void. In *Wilson v. Turner*, 164 Ill. 398, this court, after discussing the authorities at some length, quoted with approval from *Jackson v. Robins*, 16 Johns. 587, the following: "We may lay it down as an incontrovertible rule, that where an estate is given to a person generally or indefinitely, with a power of disposition, it carries a fee; and the only exception to the rule is where the testator gives to the first taker an estate for life, only, by certain and express words and annexes to

it a power of disposal." That rule has always been followed. Where the first taker, however, is given an absolute interest the express power to convey by deed is mere surplusage. The power of sale added to such an estate does not increase the estate. (*Williams v. Elliott*, 246 Ill. 548.) The courts are disposed to adopt such a construction as will give an estate of inheritance to the first donee. When the fee is devised by a clause or clauses of the will and other portions are relied on as limiting or qualifying the estate thus given, they must show a clear intention on the part of the testator to thus limit or qualify the estate granted or such limitation will be void. The estate is not to be cut down by dubious, vague or ambiguous language following an explicit devise of the fee. (*Bowen v. John*, 201 Ill. 292, and cases cited.) While such authors as Gray and Kales criticise the present application of these rules with reference to a gift over after a devise in fee, they agree that the great weight of authority supports them. (Gray on Restraints of Alienation of Property,—2d ed.—secs. 74-74g; Kales on Future Interests, secs. 172-176.) The language in this will relied upon to limit the devise in fee to the executrix is not clear and certain. If there be any repugnancy between various parts of the will, in view of the wording of the will it must be held that the clauses alleged to limit the devise in fee are void. The following are a few among many other authorities supporting this conclusion: *Howard v. Carusi*, 109 U. S. 725; *Mansfield v. Shelton*, 67 Conn. 390; *Law v. Douglass*, 107 Iowa, 606; *Killefer v. Bassett*, 146 Mich. 1; Beach on Wills, secs. 216-220, and authorities cited.

I can reach no other conclusion, therefore, than that the decree of the circuit court and the opinion of this court construe improperly the will in question.

JOHN L. SCHENCK, Appellant, *vs.* W. P. BALLOU *et al.*
Appellees.

Opinion filed February 23, 1912.

1. **CONTRACTS**—*construction of words "on or before."* A written contract for the conveyance of property subject to an encumbrance "due on or before two years," means that the encumbrance will mature in two years but may be paid at any time before maturity or at maturity; and under such contract, if the encumbrance is by its terms due before the two years, it is the duty of the proposed vendor to secure an extension, so that the encumbrance will not mature before two years from the date of the contract.

2. **SPECIFIC PERFORMANCE**—*complainant not entitled to specific performance if he is in default himself.* A complainant who has failed to comply with his contract to obtain an extension of time on an encumbrance upon the property is not in a position to demand specific performance.

3. **SAME**—*a contract must be fair and free from misrepresentation.* Before a court of equity will decree specific performance of a contract the terms of the agreement must be clearly shown, and the contract must have been entered into fairly and understandingly and without material misrepresentation.

APPEAL from the Superior Court of Cook county; the Hon. FARLIN Q. BALL, Judge, presiding.

ROBERT B. CLARK, for appellant.

W. H. HILL, and ERIC WINTERS, for appellees.

MR. JUSTICE VICKERS delivered the opinion of the court:

This is an appeal from a decree of the superior court of Cook county dismissing, for want of equity, a bill filed to enforce the specific performance of a contract for the exchange of a flat-building in the city of Chicago for a farm located in the State of Michigan. The bill was filed by John L. Schenck against W. P. and J. D. Ballou to enforce a written contract entered into December 23, 1910. By the terms of the contract Schenck agreed to convey to

W. P. Ballou a flat-building in Chicago, subject to an encumbrance of \$27,500, due on or before two years, for the Michigan farm, containing 1320 acres, subject to an encumbrance of \$7500, due in three and a half years. The encumbrance on the flat-building consisted of two several obligations, each secured by a trust deed,—a principal note of \$18,000, which by its terms matured November 2, 1910, and another note for \$9500, which would come due on October 3, 1912.

It appears from the evidence that on the 23d day of December, 1910, Robert L. Schenck, a brother of appellant and agent for him, submitted to appellee W. P. Ballou a proposition to exchange the flat-building for the farm. Ballou was eighty-three years old at that time and in a feeble state of health. After the proposition was made Ballou was requested to examine the flat-building, which he did. There is a controversy in the evidence as to what was said by Schenck in relation to the extension that would be obtained on the encumbrance on the flat-building. Ballou contends that he refused to consider the proposition unless the encumbrance on the flat-building could be extended five years, and that Robert L. Schenck assured him that such extension would be secured and with that understanding the flat-building was examined. After looking at the flat-building Ballou returned to the office of Robert L. Schenck and informed him that he had seen the property and was satisfied with it, but that he was very much exhausted and dizzy from the exertion of examining the property and did not wish to undertake to close up a contract that day, but upon being urged by Robert L. Schenck to close the matter up at once, the contract in question was drawn up and signed by Ballou. Ballou did not read the contract himself but it was read aloud in his presence. He testifies that Robert L. Schenck told him that the contract was drawn up in accordance with their understanding and that the encumbrance on the flat-building would run for five years,

and thereupon he signed the contract. On the 26th or 27th of December Ballou again called at the office of Robert L. Schenck and asked for a copy of the contract and Schenck refused to give it to him. At this time Schenck informed Ballou that the encumbrance on the flat-building would mature in two years, and thereupon Ballou stated that that was not according to the understanding, and he would not carry out the contract and execute a deed unless the encumbrance on the flat-building was extended five years. At the time of this conversation the contract had not been signed by appellant, but afterwards, on December 31, appellant attached his name to the contract. On January 27 W. P. Ballou conveyed the farm to his son, J. D. Ballou. There is some evidence tending to show that on or about January 14 appellant tendered W. P. Ballou a deed for the flat-building and a guaranty policy issued by the Chicago Title and Trust Company guaranteeing the title to said property, subject to certain defects, charges and encumbrances, against which the policy did not guarantee. The alleged tender is denied by W. P. Ballou. The evidence is conflicting in regard to the alleged tender, and also as to what was said by the parties at the time the contract was written up concerning the time to which the encumbrance should be extended on the flat-building, but in the view that we take of this case it will not be necessary to consider questions of fact about which the evidence is conflicting.

The written contract provides that the flat-building was to be conveyed to W. P. Ballou "subject to an encumbrance of \$27,500, at five per cent interest, due on or before two years." The meaning of this clause in the contract is, that the encumbrance will mature in two years but may be paid at any time on or before maturity. Such is the uniform construction given to the words "on or before." (*Wall v. Simpson*, 29 Ky. 155; 22 Am. Dec. 72; 6 Words and Phrases, 4967.) Under this contract the appellant was required to procure an extension of the encumbrance upon

the flat-building for a period of two years from the date of the contract. The deed introduced on the trial as an offer on the part of appellant to convey the flat-building, recites that the conveyance is made "subject to encumbrance of twenty-seven thousand five hundred dollars (\$27,500.)" The written contract provided that each party should furnish to the other, within a reasonable time from the date thereof, either a certificate of title issued by the registrar of titles of Cook county, or a complete merchantable abstract of title (or merchantable copy thereof) brought down to cover this deed, or a merchantable title guaranty policy showing a good and sufficient title at the date of the contract in the respective parties to the property agreed to be conveyed by them. Another clause in the contract provided that the conveyance was to be subject to certain taxes and special assessments and other restrictions in regard to buildings, party walls, etc. Appellant elected to furnish a guaranty policy under this contract, and on the trial introduced a policy which had been procured from the Chicago Title and Trust Company as a compliance with the contract. The guaranty policy introduced guarantees the title subject to certain defects and encumbrances set forth in schedule "B" attached to said policy and made a part thereof. In said schedule "B" the encumbrance on the flat-building is described as a certain trust deed dated November 2, 1905, made by William L. Moss and wife to Fred Miller to secure his note for \$18,000, due five years after date, with interest at five per cent per annum, payable semi-annually, and another certain trust deed (item 3 in schedule "B") is described as a trust deed dated January 12, 1906, made by William L. Moss to Henry M. Bacon to secure a note dated October 3, 1902, for \$9500, due ten years after date. There was no other evidence offered by appellant bearing upon the time when the encumbrance on the flat-building would mature.

It will thus be seen that by the guaranty policy \$18,000 of the \$27,500 encumbrance on the flat-building was fifty-one days past due when the contract was entered into, and that \$9500 of said encumbrance would mature October 3, 1912, which was nearly three months short of the two years the encumbrance was to be extended by the terms of the written contract. Under the terms of the contract it was appellant's duty to procure an extension of the encumbrance upon the flat-building for a term of two years. This he wholly failed to do, and, being himself in default at the time the bill was filed and at the time of the hearing, he is not in a position to call upon a court of equity to compel a specific performance of the contract by the appellees. The rule is well established that before one is entitled to a decree for the specific performance of a contract he must show that he was ready, able and willing to perform the contract on his part. (*Beach v. Dyer*, 93 Ill. 295; *Hatch v. Kizer*, 140 id. 583; *Skeen v. Patterson*, 180 id. 289.) Conceding that appellant is right in his contention that the encumbrance was only to be extended two years, instead of five, as contended by appellees, it clearly appears that he wholly failed to obtain the extension of the encumbrance for the time which he admits it was to be extended. Aside from this, there is another sufficient reason why the court might, in the exercise of that discretion accorded courts of equity in matters of this kind, have well refused a decree for the specific performance of this contract. If appellees are to be credited in their testimony as to the understanding, at the time the contract was drawn up, as to the extension of the encumbrance for five years, then there was either misrepresentation and fraud on the part of the appellant's agent or a serious and material misapprehension of the terms of the contract at the time W. P. Ballou signed it, and in either event a court of equity may properly refuse to decree a specific performance. (*Frisby v. Ballance*, 4 Scam. 287; *Bowman v. Cunningham*, 78 Ill. 48; *Skeen*

v. Patterson, supra.) Before a court of equity will grant a decree requiring a party to specifically perform a contract the terms of the agreement must be clearly shown and it must appear to have been entered into fairly and understandingly. If the terms of the contract are doubtful, or if it appears that there has been any material misrepresentation in its procurement, specific performance will be denied.

There was no error in dismissing the appellant's bill for want of equity, and the decree of the superior court of Cook county is affirmed.

Decree affirmed.

THE PEOPLE *ex rel.* A. E. Woods, County Treasurer, Appellant, *vs.* THE CINCINNATI, INDIANAPOLIS AND WESTERN RAILWAY COMPANY, Appellee.

Opinion filed February 23, 1912.

1. TAXES—*statute does not authorize filing of original tax levy ordinance with county clerk.* Section 1 of article 8 of the Cities and Villages act provides for the filing of a certified copy of the tax levy ordinance in the office of the county clerk, and the filing of the original tax levy ordinance in the office of the county clerk does not authorize him to extend the taxes.

2. SAME—*when tax levy ordinance filed with county clerk can not be shown to be a copy.* If the paper filed in the office of the county clerk purports to be the original tax levy ordinance and not a copy thereof, it cannot be amended, upon application for judgment and order of sale, by permitting the village clerk to testify that the paper was a copy and to add his certificate to the paper to that effect.

APPEAL from the County Court of Edgar county; the Hon. DAN V. DAYTON, Judge, presiding.

WALTER V. ARBUCKLE, and JAMES K. LAUHER, for appellant.

SHEPHERD & TROGDON, for appellee.

Mr. JUSTICE HAND delivered the opinion of the court:

This was an application for judgment and order of sale by the county treasurer of Edgar county against the property of the appellee, in the county court of said county, for a village tax of \$117.46 extended for the year 1910, in favor of the village of Metcalf, against the property of the appellee. The appellee appeared and filed objections, which were sustained and judgment and order of sale was denied, and an appeal has been prosecuted to this court to reverse the judgment of the county court.

The ground of objection urged in the court below and in this court against said tax is, that no certified copy of the ordinance by virtue of which the said tax was levied was filed in the office of the county clerk of Edgar county. The record shows that the village clerk of the village of Metcalf filed in the county clerk's office what purported upon its face to be the original (and not a certified copy) tax levy ordinance. Section 1 of article 8 of the City and Village act provides for the filing of a certified copy and not the original tax levy ordinance, and it has been held by this court that the filing of the original tax levy ordinance in the office of the county clerk does not authorize that officer to extend a valid tax. *Village of Russellville v. Purdy*, 206 Ill. 142; *Cincinnati, Indianapolis and Western Railway Co. v. People*, 213 id. 558; *People v. Kankakee and Southwestern Railroad Co.* 218 id. 588; *People v. Cairo, Vincennes and Chicago Railway Co.* 248 id. 36.

To avoid the objection raised against the tax levy, the appellant called the village clerk, who testified that he sent the tax levy ordinance offered in evidence to the county clerk by mail; that it was a copy of the ordinance as it appeared in the ordinance book, and that he enclosed with the ordinance a letter to the county clerk, in which he stated he "enclosed a copy of the tax levy for the village of Metcalf for the year 1910," and, based upon this evidence, it

was sought to amend the tax levy ordinance filed with the county clerk by adding thereto the clerk's certificate showing the ordinance on file in the county clerk's office was a certified copy and not the original ordinance. The county court permitted the amendment to be made, but subsequently, doubtless being of the opinion the amendment had been improperly permitted to be made, refused to enter judgment and order of sale upon said tax levy against the property of appellee, and the sole question argued here is the right of the appellant to amend said tax levy ordinance filed with the county clerk so as to show it to be a certified copy and not the original tax levy ordinance.

The ordinance filed with the county clerk could not properly be amended unless there was something upon the face of the ordinance filed with the clerk which showed it was a copy and not the original tax levy ordinance. The ordinance, as filed, purported, upon its face, to be the original, and the ordinance as it appeared on file in the county clerk's office could not be contradicted by what the village clerk said to the county clerk, by word of mouth or by letter, at the time the tax levy ordinance was filed, and then base an amendment upon the village clerk's testimony which contradicted the ordinance. In a case similar to the one at bar it was said: "If a paper is filed with the county clerk which appears on its face to be a copy, it may be amended on the hearing by adding a complete and proper certificate." (*People v. Cairo, Vincennes and Chicago Railway Co. supra.*) If, however, the paper filed did not appear to be a copy and could not have been so regarded by the county clerk there was nothing which could be amended. *People v. Cairo, Vincennes and Chicago Railway Co. supra.*

The court did not err in sustaining the objections to the tax, and the judgment of the county court is affirmed.

Judgment affirmed.

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,
vs. THE BOOTH FISHERIES COMPANY, Plaintiff in Error.

Opinion filed February 23, 1912.

1. FISH AND GAME—*legislature may confer upon person taking or killing fish or game such property rights as it sees fit.* The ownership of fish, wild fowls or wild animals is in the State, and the legislature has the right to prohibit the killing or taking of them, or to permit such killing or taking upon such reasonable conditions as it deems just, and to confer upon the person taking or killing them such property rights therein as it deems best, or none at all.

2. SAME—*legislature has power to make law effective by providing against its evasion.* The legislature has the power to enact a law for the preservation and protection of fish in domestic waters, and, having such power, may make such law effective by providing against its evasion, and for that purpose may limit the use of private property to the detriment of the law.

3. SAME—*sections 11 and 12 of Fish and Game law of 1911 apply to fish caught in other States.* Section 11 of the Fish and Game law of 1911, (Laws of 1911, p. 351,) which makes it unlawful, at any time, to sell, offer or expose for sale, or have in possession for the purpose of selling, any black bass, pike, pickerel or pike perch, and section 12, which makes it unlawful, at any time, to transport, ship or take to any point outside this State any black bass, pike, pickerel or pike perch, apply to such fish, whether caught in this State or elsewhere. (*Magner v. People*, 97 Ill. 320, followed.)

4. CONSTITUTIONAL LAW—*section 11 of Fish and Game law of 1911 is valid.* Section 11 of the Fish and Game law of 1911 does not prohibit the importation into the State of the kinds of fish therein specified except for the purpose of selling the same or offering for sale, and the fact that it may to that extent indirectly affect inter-State commerce does not render it invalid; nor is it invalid as depriving persons of property without due process of law.

5. SAME—*section 12 of Fish and Game law is invalid as applied to fish shipped into the State.* Section 12 of the Fish and Game law of 1911 is valid in so far as it prohibits the shipping out of this State black bass, pike, pickerel or pike perch which have been caught in this State, but as to such kinds of fish which have been shipped into Illinois the section is invalid, as an unlawful interference with inter-State commerce.

6. SAME—*when laws are valid though they indirectly affect inter-State commerce.* Laws passed by a State in the exercise of its

police power and not in conflict with the acts of Congress on the same subjects are valid laws, even though they may remotely and indirectly affect inter-State commerce.

7. SAME—*State cannot wholly exclude a lawful article of commerce.* A State may, in the exercise of its police power, regulate the introduction of a lawful article of commerce so as to insure its purity, but it has no power to totally exclude a lawful article of commerce produced in another State or country or to prohibit the transportation of the same out of the State, as such action is an unlawful restriction of inter-State commerce.

WRIT OF ERROR to the Municipal Court of Chicago; the Hon. JOHN R. CAVERLY, Judge, presiding.

WINSTON, PAYNE, STRAWN & SHAW, (JOHN BARTON PAYNE, SILAS H. STRAWN, and WALTER H. JACOBS, of counsel,) for plaintiff in error:

Section 12 of the Fish and Game law is unconstitutional and void. It is in contravention of the fourteenth amendment to the constitution of the United States and of section 2 of article 2 of the constitution of the State of Illinois, in that it deprives the defendant of its property without due process of law, and violates the common rights of the citizen, is unreasonable and is beyond the power of the legislature to enact. *Ritchie v. People*, 155 Ill. 98; *Chicago v. Netcher*, 183 id. 104; *Frorer v. People*, 141 id. 171; *Coal Co. v. People*, 147 id. 66; *Silz v. Hesterberg*, 211 U. S. 31.

Section 12 is unconstitutional and in contravention of the commerce clause of the constitution of the United States. *In re Davenport*, 102 Fed. Rep. 540; *McDonald v. Express Co.* 134 id. 282; *State v. Saunders*, 19 Kan. 127; *Railroad Co. v. Husen*, 95 U. S. 465; *Schollenberger v. Pennsylvania*, 171 id. 1; *Magner v. People*, 97 Ill. 320.

The statute does not apply to fish caught outside the limits of the State of Illinois and transported from the State of Illinois to other States. *Commonwealth v. Wilkinson*, 139 Pa. St. 298; *People v. Fish Co.* 164 N. Y. 93;

Commonwealth v. Hall, 128 Mass. 410; *People v. Booth & Co.* 86 N. Y. Supp. 272.

W. H. STEAD, Attorney General, JOHN E. W. WAYMAN, State's Attorney, and CHARLES E. WOODWARD, (ZACH HOFHEIMER, of counsel,) for the People:

The Fish act of 1911 is a proper exercise of the police power of the State, with a clear view to the protection of the fish supply for the use of the inhabitants of the State. *Magner v. People*, 97 Ill. 320; *Merritt v. People*, 169 id. 219; *Express Co. v. People*, 133 id. 649; *Sils v. Hesterberg*, 211 U. S. 31.

In *Magner v. People*, 97 Ill. 320, it was held the prohibition of the sale of quail in Illinois, even if legally caught in Kansas, was a proper exercise of the police power.

The provision of section 12 making it unlawful to transport, ship or take to any point outside this State any fish of the species of pike, violates no provision of the Federal constitution. *Geer v. Connecticut*, 161 U. S. 519.

Section 12 is clear, certain and unambiguous in its terms, and applies with as much force to the transportation to points outside of this State of pike caught and taken beyond the limits of this State as it does to the transportation of pike caught and taken in the waters of this State. *Merritt v. People*, 169 Ill. 219; *Magner v. People*, 97 id. 320; *Sils v. Hesterberg*, 211 U. S. 31.

The prohibition of the transportation to points outside of the State of all pike tends to the protection of pike in the waters under the jurisdiction of this State, and is a reasonable exercise of the police power of the State. *Magner v. People*, 97 Ill. 320; *Sils v. Hesterberg*, 211 U. S. 31.

Section 12 is not in contravention of the commerce clause of the constitution of the United States. *Geer v. Connecticut*, 161 U. S. 519; *Sils v. Hesterberg*, 211 id. 31; *Magner v. People*, 97 Ill. 320; *Merritt v. People*, 169 id. 219; *People v. Lassen*, 142 Mich. 597.

Mr. JUSTICE DUNN delivered the opinion of the court:

The plaintiff in error, the Booth Fisheries Company, was convicted on four informations in the municipal court of Chicago for violations of the Fish law. (Laws of 1911, p. 348.) By this writ of error it questions the constitutionality and construction of the sections of the statute involved.

Two of the informations charged the defendant with having in its possession, for the purpose of selling, one fish commonly called pike, in violation of section 11, which declares it unlawful "at any time to sell or offer or expose for sale, or have in possession for the purpose of selling, any black bass, pike," etc. The other two informations charged that the defendant transported and shipped from Chicago at one time one hundred and twenty-five pounds of fish commonly called pike, to Mason City, Iowa, and at another time thirty pounds of fish commonly called pike, to Fort Dodge, Iowa, in violation of section 12, which declares it unlawful "at any time to transport, ship or take to any point outside this State, any black bass, pike," etc., with an exception permitting any person to carry with him or transport as baggage, under certain conditions, a certain quantity of fish legally caught in waters under the jurisdiction of this State. The cases were tried by the court without a jury upon stipulations, which were the only evidence offered.

The Booth Fisheries Company is a corporation organized under the laws of Delaware, authorized to do business in this State, having the right, under its charter, to engage in the business of buying and selling fish and oysters, and is actually carrying on that business in Chicago and in various States of the United States and in Canada. The facts claimed to constitute the two violations of section 11 are, that the defendant had in its possession, for the purpose of selling, one pike which was sound, wholesome and fit for human consumption and was caught in the Lake of the

Woods, in the State of Minnesota, and shipped to the defendant from Warroad, Minnesota; and it also had in its possession one pike which was sound, wholesome and fit for human consumption and was caught in Lake Manitoba, in the province of Manitoba, in the dominion of Canada, and was shipped to the defendant from Oak Point, Manitoba.

The facts claimed to constitute one violation of section 12 are, that the defendant, in pursuance of an order from J. F. Stott, of Mason City, Iowa, sold, transported and shipped to him from Chicago, through the Wells-Fargo Express Company, to Mason City, Iowa, one hundred and twenty-five pounds of pike which were sound, wholesome and fit for human consumption, were caught in Lake Manitoba, in the province of Manitoba, in the dominion of Canada, and were shipped to the defendant from Oak Point, Manitoba. These fish were purchased by the defendant for sale in States other than Illinois, and for convenience of transportation, handling and distribution were brought to Chicago and stored in the defendant's cold storage warehouse. At the time of their shipment from Chicago to Mason City, Iowa, they were articles in storage in transit in inter-State commerce. The other case for the violation of section 12 is exactly similar, names, places and quantities being changed, the fish in this case having been caught in the Lake of the Woods, in Minnesota, and shipped to the defendant from Warroad, Minnesota.

The grounds for reversal argued are, that the provisions of sections 11 and 12 do not apply to fish caught outside the State of Illinois, and that if they do so apply, they deprive the plaintiff in error of its property without due process of law, in violation of section 2 of article 2 of the constitution of the State and of the fourteenth amendment of the Federal constitution, and are in violation of clause 3 of section 8 of article 1 of the Federal constitution,—the commerce clause. The first ground would be entitled to serious attention if we were at liberty to consider it as an original

proposition, but we regard the case of *Magner v. People*, 97 Ill. 320, as conclusive of this contention. The act there under consideration was a revision of the law in relation to the protection of game, while the act here is a revision of the law in relation to the propagation and protection of fish in all waters under the jurisdiction of this State. The first two sections of that act made unlawful the hunting, killing or taking of certain animals, wild fowls and birds at specified times, and the buying, selling or having in possession for such purpose, during such specified times, any of such animals, wild fowls or birds taken contrary to the provisions of the act. Section 6 then provided that "no person or persons shall sell or expose for sale, or have in his or their possession for the purpose of selling or exposing for sale, any of the animals, wild fowls or birds mentioned in section 1 of this act, after the expiration of five days next succeeding the first day of the period in which it shall be unlawful to kill, trap or ensnare such animals, wild fowls or birds." In the present case the earlier sections of the act make it unlawful to catch or kill certain fish of specified kinds and sizes at certain times and by certain means or devices, or to sell, offer for sale or have in possession such fish so caught or killed. The material parts of sections 11 and 12 have already been quoted. The cases are closely analogous. In the former case the court said: "Section 6 is more comprehensive in its language than either section 1 or section 2. * * * No exception whatever is made with reference to the time when or place where such animals, wild fowls or birds shall have been killed, trapped or ensnared, but the language, as plainly as language can, includes all animals, wild fowls and birds." We regard the construction placed upon language so similar, in a case so nearly the same, as conclusive of the meaning.

There is no property in fish, wild fowls or wild animals until they have been reduced to possession. The ownership of wild game is in the State, and the legislature has

the right to prohibit the killing or taking of it, or to permit such killing or taking, upon such reasonable conditions as it deems just, and to confer upon the person taking or killing it such property rights therein as it thinks best, or none at all. (*Magner v. People*, *supra*; *American Express Co. v. People*, 133 Ill. 649; *People v. Bridges*, 142 id. 30; *Cummings v. People*, 211 id. 392; *State v. Snowman*, 94 Me. 99; *State v. Lewis*, 134 Ind. 250; *Geer v. Connecticut*, 161 U. S. 519.) In these and many other cases the power of the State to regulate, for their preservation and protection, the time, place, manner and condition of taking game and fish has been recognized and it is conceded by the plaintiff in error. The statute permits the taking of fish of legal size or weight with hook and line at any time. Section 10 prescribes the legal size or weight below which it shall be unlawful to catch or to sell or offer for sale fifteen specified varieties of fish, including pike, besides turtle or terrapin and frogs. There is no prohibition in this section of the sale of fish above the specified size. Section 11, however, forbids the sale, and section 12 the transportation out of the State, of any fish of four of the varieties mentioned in section 10, viz., black bass, pike, pickerel and pike perch, commonly known as wall-eyed pike or as jack or yellow salmon. These fish of the legal size may be taken at any time with hook and line but not otherwise, and they may not be sold at any time. To prevent evasions of the law (it is to be presumed) by the sale of fish of these varieties caught in the waters of this State under the pretense that they were caught outside the State, section 11 prohibits the sale, and section 12 the transportation, of such fish even though caught outside the State. It is contended that this provision is not only unreasonable and unnecessary, but that instead of preserving or increasing the food supply of the State it will deprive the people of the State of thousands of tons of cheap fish,—wholesome food,—now imported from Minnesota and Canada. The object of the law is to pre-

vent the destruction of the varieties of fish named, by prohibiting the taking of them otherwise than by hook and line. As a means of enforcing this prohibition the legislature has seen fit to prohibit the sale of such fish, no matter where or how taken. We held in the *Magner case* that such prohibition tended to the protection of game in this State and was a proper exercise of the police power. The same conclusion has been reached in numerous decisions of the courts of other jurisdictions. (*Phelps v. Racey*, 60 N. Y. 10; *Commonwealth v. Savage*, 155 Mass. 278; *Roth v. State*, 51 Ohio St. 209; *Ex parte Maier*, 103 Cal. 476; *State v. Rodman*, 58 Minn. 393; *State v. Schuman*, 36 Ore. 16; *People v. O'Neil*, 110 Mich. 324; *Haggerty v. St. Louis Ice Manufacturing and Storage Co.* 143 Mo. 238; *Stevens v. State*, 89 Md. 669; *Silz v. Hesterberg*, 211 U. S. 31.) The legislature, having the power to enact a law for the preservation and protection of fish in domestic waters, had the right to make the law effective by providing against its evasion, and for that purpose to limit the use of private property to the detriment of the law. The act does not interfere with the use of either domestic or imported fish by the owner for his own consumption or with his giving it away. It is only such use as interferes with the purposes of the act which is prohibited. Neither the fourteenth amendment to the constitution of the United States nor section 2 of article 2 of our State constitution interferes with the legitimate exercise of the police power of the State,—the power to adopt all regulations necessary for the health, good order, morals and welfare of society. Where the power exists, the manner and means of enforcing it rests with the legislature, so long as such manner and means are reasonably adapted to the purpose and do not arbitrarily and unreasonably interfere with rights protected by the constitution.

It is contended that sections 11 and 12 unlawfully restrict commerce with foreign nations and among the States.

So far as section 11 is concerned, this question seems to have been disposed of by the Supreme Court of the United States,—the final authority,—in the case of *Silz v. Hesterberg; supra*. In that case a statute of the State of New York which prohibited the possession of game during the closed season was held not to be an unconstitutional regulation of commerce, even though it applied to game lawfully taken in a foreign country during the open season there. The rule was applied which has been repeatedly held, that laws passed by a State in the exercise of the police power, not in conflict with laws of Congress on the same subject and indirectly or remotely affecting inter-State commerce, are nevertheless valid laws. It was said that the purpose of the law was not to regulate inter-State commerce, but, by laws applicable alike to foreign and domestic game, to protect the people of the State in the right to use and enjoy the game of the State. While these provisions may incidentally affect the right of one importing game to hold and dispose of it in the closed season, the effect is only incidental. It is true that in that case there was an open season, while here there is no time during which the fish may be possessed for sale though they may be taken in the manner allowed by the statute at any time. The right to preserve game has its origin in the police power, and may be enforced by adequate police regulation though commerce may be indirectly affected. When the power is conceded, then the extent to which, and when and how, it shall be exercised are for the determination of the legislature, so that such exercise does not result in the arbitrary destruction of constitutional rights. The legislature has deemed it expedient for the protection of domestic fish of the varieties named not to fix any absolutely closed season, but to prohibit certain methods of taking fish and permit them to be taken with hook and line at all times,—not to absolutely prohibit the possession of such fish at any time, but only the

possession of fish below a certain size and of fish intended for sale, without reference to where or when they have been taken. The principle of the *Silz case* applies to this condition. The object of section 11 is not to regulate inter-State commerce, but, by laws applicable alike to foreign and domestic fish, to protect the people of the State in the right to use and enjoy the fish of the State, and the effect upon importers of fish is incidental, only.

With regard to section 12 the case is different. That section deals with inter-State commerce, and that only. So far as it concerns fish caught within the State it is valid, for since fish are the common property of the people of the State, and may be taken only upon such terms as the State, acting for the benefit of the people, may allow, the ownership acquired by such taking is qualified and is subject to the regulations imposed by law, (*Geer v. Connecticut, supra*,) but so far as it concerns sound and wholesome fish taken outside the State, as in this case, it is void. A State has no power to wholly exclude a lawful article of commerce produced in another State or country. While it may regulate the introduction of an article, including a food product, so as to insure its purity, the police power does not extend to its total exclusion. (*Schollenberger v. Pennsylvania*, 171 U. S. 1.) In that case an act of the legislature of Pennsylvania prohibiting the manufacture and sale of oleomargarine to the extent that it prohibited its introduction from another State and sale was held void. In *Minnesota v. Barber*, 136 U. S. 313, an act for the protection of the public health by providing for inspection in Minnesota, before slaughter, of animals designed for human food was held to be an unconstitutional regulation of inter-State commerce. The same doctrine was applied to a similar Virginia statute, in *Brimmer v. Rebman*, 138 U. S. 78. So it was held in regard to a statute prohibiting the driving or conveying into the State of Missouri of Texas, Mexican or Indian cattle between the first day of March

and the first day of November in each year. (*Hannibal and St. Joseph Railroad Co. v. Husen*, 95 U. S. 465.) And the same principle was affirmed in the cases concerning the importation of intoxicating liquors into States whose laws prohibited their manufacture or sale. (*Bowman v. Chicago and Northwestern Railway Co.* 125 U. S. 465; *Leisy v. Hardin*, 135 id. 100.) In all these cases the statute prohibited the bringing of the forbidden article into the State, but the case is not different where the statute prohibits the transportation of the article out of the State. Commerce between the States is as much restricted by detaining the property involved within the State as by keeping it out. Sound, wholesome fish constitute a valuable article of food and are property. The owner of such fish taken in another State or a foreign country has the right to bring them into Illinois for any lawful purpose. He may not have the possession of them here for the purpose of sale, but he may have them for his own consumption, to give away, or he may store them. He has the right to receive another's fish for storage. If, being the owner, he desires to ship them to another State he has the right to do so, or if, having them in store for another, the owner orders him to ship them to another State he may do so. This transportation of commodities from one State to another is inter-State commerce, and section 12 of the act, so far as it prohibits such transportation, is unconstitutional and void.

The judgments in cases No. 7978 and No. 7981 will be affirmed and in No. 7979 and No. 7980 will be reversed, and the latter causes will be remanded.

Nos. 7979 and 7980 reversed and remanded.

Nos. 7978 and 7981 affirmed.

THE CITY OF PARK RIDGE, Appellee, *v.*s. ALBERT WISNER,
et al. Appellants.

Opinion filed February 23, 1912.

1. SPECIAL ASSESSMENTS—*item of engineer's estimate for "lawful expenses" is proper.* An item of the engineer's estimate reading, "six per cent for lawful expenses, \$3625.50," is not insufficient because not expressly limited to the cost of making, levying and collecting the assessment, as section 10 of the Local Improvement act requires a statement in the estimate that it does not exceed the probable cost of the improvement and lawful expenses attending the same.

2. SAME—*effect where estimate contains the item "six per cent for lawful expenses."* Where the engineer's estimate contains an item of "six per cent for lawful expenses," followed by the amount, it is still discretionary with the city council to provide by the ordinance that some sum, not exceeding six per cent of the assessment, shall be applied toward the payment of the cost of making and collecting it.

3. SAME—*section 53 of Local Improvement act means that all interests in land needed must be acquired.* Section 53 of the Local Improvement act, providing that no special assessment shall be levied for any local improvement until the land necessary therefor shall be acquired and in possession of the municipality, is not complied with by acquiring the right of one who has a mere easement in the land, but means that all rights and interests therein shall be acquired, so that the municipality shall have an absolute right not only to construct but to maintain the improvement.

4. SAME—*city must acquire right from owners of the fee to lay sewer in a highway.* Assuming that the highway commissioners may, so far as the rights of the public are concerned, consent to the construction by a city of a sewer in a highway outside of the corporate limits of the city, it is still necessary, under section 53 of the Local Improvement act, that the city shall obtain the consent of the owners of the fee. (*Cochran v. Village of Park Ridge*, 138 Ill. 295, distinguished.)

5. SAME—*what does not amount to joint use of improvement by city and town.* The fact that the grant by highway commissioners to a city of the right to construct a sewer in a highway beyond the corporate limits of the city is conditioned upon the construction by the city of a certain number of catch-basins for the benefit of the highway does not render the improvement one for the joint

use of the city and town, and the improvement does not, by reason of such condition, cease to be a local improvement.

6. *SAME*—when court should not adopt opinions of witnesses as to benefits. It is error for the court, in determining the question of benefits in a sewer assessment proceeding, to base its judgment on opinions of the witnesses for petitioner made without regard to existing conditions or the location of the land, it being the opinion of such witnesses that two pieces of property were benefited the same by a sewer which drained one and did not drain the other, and that lands which were high and well drained were benefited the same as low lands at times partially submerged.

APPEAL from the County Court of Cook county; the Hon. DAVID T. SMILEY, Judge, presiding.

GEORGE A. MASON, BAYLEY & WEBSTER, EDWIN A. MUNGER, DANIEL S. WENTWORTH, and JOHN F. SPOHN, for appellants.

WILLIAM J. DONLIN, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

This is an appeal from a judgment of the county court of Cook county confirming an assessment against the lands of appellants for the cost of constructing a combined sanitary and storm-relief sewer in the city of Park Ridge, and extending west of the city, in a public highway of the town of Maine, to the Desplaines river.

One objection overruled by the court was that the engineer's estimate was insufficient because the item "six per cent for lawful expenses, \$3625.50," might include things not authorized by law, and should have been expressly limited to the cost of making, levying and collecting the assessment, as authorized by section 94 of the Local Improvement act. The provision of that section is, that in cities of the class of Park Ridge the city council may, in the ordinance for the assessment, provide that a certain sum, not to ex-

ceed six per cent of the amount of the assessment, shall be applied toward the payment of the costs of making and collecting the same. The purpose of the estimate is to show the cost of making the improvement itself, but section 10 requires a statement in the estimate that it does not exceed the probable cost of the improvement and the lawful expenses attending the same, so that it is proper to include such a sum as the council may add to the actual cost to cover the expense of making and collecting the assessment. The estimate in this case followed the language of section 10, and being within the six per cent authorized by the statute it was not subject to the objection. (*Snydacker v. Village of West Hammond*, 225 Ill. 154.) It was still discretionary with the city council to provide by the ordinance that some sum, not exceeding six per cent of the assessment, should be applied toward the payment of the cost of making and collecting it, and the ordinance did make such provision.

The next objection was that the petitioner had not complied with section 53 of the Local Improvement act, which provides that no special assessment shall be levied for any local improvement until the land necessary therefor shall be acquired and in possession of the municipality, except in cases where proceedings to acquire such land shall have been begun and proceeded to judgment. The sewer was to be of concrete and the main part of it was to have an internal diameter of six feet. That part was more than a mile in length and a large part of it was to be laid in a highway outside of the city. The city had acquired from the highway commissioners the right to lay the sewer in the south half of the highway so far as the public easement was concerned, but had not acquired that right from the owners of the fee. The highway commissioners had executed an agreement permitting the construction, maintenance and repair of the sewer in the highway, with catch-basins (not exceeding six) located at suitable points, and

the city had agreed to restore the highway, to keep the sewer and catch-basins in good repair, and to save the commissioners and town of Maine from any and all liability on account of the grant or the construction of the sewer in the highway. The highway was sixty-six feet wide, and there was no controversy as to its existence or the easement of the public therein for highway purposes, but the highway was subject, under the law, to vacation or abandonment, in which case the land would be released from the burden of the easement. There was a sewer in the north half of the highway, constructed when the city was a village, and in the case of *Cochran v. Village of Park Ridge*, 138 Ill. 295, it was held that the commissioners might consent to the laying of that sewer in the highway, for the reason that some benefit would be derived from it. The record in that case was offered in evidence by the petitioner in this case, and is now insisted upon as concluding the appellants, by way of estoppel by verdict, on the question whether the necessary land had been acquired. It does not have that effect for the reasons that the subject matter of the two proceedings is not the same, that a part of appellants were not parties to the former proceeding, and that the requirement of section 53 was not contained in the statute then in force. Accepting the former decision as the law concerning the right of highway commissioners to give consent so far as the public are concerned, it is still true that they could grant no greater right than they themselves had, and, as against the land owners, could not subject the land to any additional easement or right beyond its use as a public highway. It is not a compliance with section 53 to acquire the right of one who has merely an easement in land, but the section means that all rights and interests therein must be acquired, so that a municipality will have an absolute right to construct and maintain the contemplated improvement. The right to be acquired and enjoyed was the right of the city to construct and perpetually maintain a

sewer for the purpose of carrying the sewage of the city to the Desplaines river. The court erred in overruling the objection.

Other objections urged here are, that if the easement was valid the improvement was for the joint use of the city and the town of Maine, and that the ordinance was not for a local improvement. The basis for these objections is, that the city was to construct catch-basins at suitable places in the highway for the benefit of the town. The town of Maine had no right to connect with the sewer and acquired no use of it aside from the benefit of the catch-basins to the highway, and the use was not joint. It was a condition of the grant that the catch-basins should be built, which would benefit the highway, and the improvement did not cease to be local because of the catch-basins. The city could as well build them with the money raised by the assessment as to build the sewer without the catch-basins.

It was contended that the lands of the appellants were assessed more than their equitable share of the assessment, and the court heard evidence on that subject. There were large tracts of land constituting farms, and two witnesses examined by the appellants gave opinions that such lands were assessed more than their equitable share or proportion. The petitioner examined two witnesses who gave opinions that the farm lands were not assessed more in proportion to benefits than the city lots, and the court overruled the objection. There was in this case, as there usually is, a statement of witnesses that they had examined the assessment roll and the lands and in their judgment the lands were not assessed more than their proportionate share. Conclusions of that kind being mere matters of opinion, cannot ordinarily be subjected to any test from which their value or correctness can be determined, and necessarily the fact must generally be left with the trial judge. The record in this case, however, shows that the witnesses for the petitioner did not base their opinions upon the condition

and needs respecting drainage and sewerage of the lands and lots assessed. The assessment of lots in the city, which were twenty-five by one hundred and twenty-five feet, was \$6.25 on each lot, and was nearly the same on the same area of farm lands. The farm of the appellant Wisner contained eighty acres and the assessment against it was \$4240, so that if it had been subdivided into twenty-five foot lots the assessment would have been a trifle less than \$6 on each lot. It was high and well drained by nature and in addition had the benefit of two sewers, while the south-western part of the city was low and subject to overflow, and buildings suffered from water in the basements and from water backing up in the existing sewers, which were inadequate. One witness for the petitioner was asked if he would say that lots which were under water at certain times of the year and suffered on account of the inadequacy of existing drainage facilities would not be benefited more than ground that was never under water, and he said that in his judgment it would not make any difference. The other witness said that he would apply the same measure of benefit, according to dimensions, where one piece was low and had no drainage facilities and another was high and well drained, both naturally and artificially. They considered that two pieces of property were benefited exactly the same by a sewer which drained one and did not drain the other. It would be a solecism to say that property which has no need or use of a sewer would be benefited by one to the same amount as another that had both need and use for it. The witnesses for the petitioner considered that the farm lands were ripe for subdivision into lots, and therefore ought to be assessed on the same basis as if they had been subdivided. There was more than one large tract of farm land, so that there would be more than a thousand lots if they were subdivided, and it would be quite remarkable if there would be a market at a place like Park Ridge for more than a thousand lots under ordinary

conditions. We cannot regard the opinions of the witnesses made without regard to existing conditions and the location and situation of various tracts and lots as a sound basis for a judgment, and must conclude that the court erred in adopting them. The evidence for the appellants was that the farm lands were not ready for subdivision and would not be for many years to come.

The judgment is reversed and the cause remanded.

Reversed and remanded.

L. G. LINES *et al.* Appellants, *vs.* LIZZIE WILLEY *et al.*
Appellees.

Opinion filed February 23, 1912.

1. DEEDS—*voluntary conveyances in hands of grantees are presumed to have been delivered.* Voluntary conveyances produced by the grantees after the grantor's death are presumed to have been delivered, and if delivered, the fact that the grantor retained possession of the property and received the rents during his lifetime does not re-invest him with title.

2. SAME—*deed will not be reformed in equity except upon convincing proof.* A court of equity will not reform a deed unless the alleged mistake is established by evidence which is convincing.

3. SAME—*equity will not aid party to regain title after making deed for unlawful purpose.* Where a party makes a deed for an unlawful purpose a court of equity will not aid him in regaining his title after the unlawful purpose is accomplished; and this rule applies not only to the grantor, but to those in privity with him.

4. APPEALS AND ERRORS—*when chancellor's findings will not be set aside.* The findings of the chancellor from conflicting oral testimony will not be disturbed by a court of review unless they are palpably against the weight of the evidence.

5. WITNESSES—*when husband of grantee cannot testify to conversations with grantor.* In a proceeding by heirs to set aside or reform certain deeds made by their ancestor, the husband of one of the grantees is incompetent to testify to conversations with the grantor tending to sustain the deeds.

APPEAL from the Circuit Court of Wayne county; the Hon. E. E. NEWLIN, Judge, presiding.

KRAMER, KRAMER & CAMPBELL, and S. E. QUINDRY, for appellants.

THOMAS H. CREIGHTON, for appellees.

Mr. CHIEF JUSTICE CARTER delivered the opinion of the court:

This is a bill in equity filed in the circuit court of Wayne county asking to have certain deeds canceled and held void as against appellants. The bill contains an alternative prayer that if appellants are not entitled to have the deeds canceled and set aside, two of said deeds shall be reformed and corrected so as to convey six instead of eighty acres. This is the second time this case has been to this court. On the first hearing a decree had been entered in the circuit court dismissing the bill for want of equity. (*Emmerson v. Merritt*, 249 Ill. 538.) It was reversed and remanded for the reason that the executor under the will, with power to sell, was the complainant instead of certain other persons who would own the real estate in case the relief prayed for was granted. On the case being re-docketed in the circuit court proper parties were added as suggested in this court's decision, issues were joined, and on a hearing before a different chancellor the bill was again dismissed for want of equity. This appeal followed.

The record shows that William Lines was a farmer owning about four hundred acres of land, a part of which (where he resided) was situated in Edwards county, and the eighty-acre tract in issue was on the bottoms of the Little Wabash river, in the adjoining county of Wayne. The two deeds in question are dated March 13, 1897. One of them set forth that William and Mary Lines, his wife, conveyed to Lizzie Merritt and "Hat" Lines "the undi-

vided one half of the north-half of the northwest quarter of Section 14 fourteen town two South Range 9 East 4 fore acres in the North-East Corner Section 14 Town 2 South Range 9 East. In Wayne County, Illinois." The other stated that William Lines conveyed to Mary Lines "the undivided one half of the north half of the north we quarter of Section 14 Foreteen town two South Range 9 East. two acres of the South east corner of Section 14 Foreteen town 2 South Range 9 nine east.. In Wayne County, Illinois." Mary Lines was the wife of William Lines, and Lizzie Merritt (who is now Lizzie Willey) and Hattie Lines (who is now Hattie Harvick) are two of their daughters. William Lines died August 9, 1909, leaving a will, whereby, after bequeathing various specific legacies to certain of his children and grandchildren, he divided the balance of his property into five portions: one to one of his sons, one to each of his three daughters, (including Mrs. Willey and Mrs. Harvick,) and one to the children of a deceased child. He appears to have left surviving two sons and three daughters and the grandchildren. The will authorized his executor, Charles Emmerson, to sell and convey the real and personal estate, and after paying the debts and specific legacies to divide the balance into five portions and distribute as provided by the will. His wife, Mary Lines, died in 1905, leaving a will, which gave all of her property, real and personal, to her daughter Lizzie Willey. The record does not show what property, if any, Mrs. Lines possessed at her death, except whatever interest she may have had in that eighty acres.

Appellees contend that these deeds conveyed the whole of the eighty-acre tract of bottom land, and, together with the will of Mary Lines, vested the title thereto in appellees Lizzie Willey and Hattie Harvick. Shortly before the original bill was filed in this case Mrs. Willey and Mrs. Harvick gave to B. F. Thomas, an attorney whom the record shows to have been at that time a partner of Thomas

H. Creighton, solicitor for the appellees, a deed to an undivided fourth interest in the eighty acres in question, and took from him a written agreement reciting that he would act as attorney and counsel in all suits to contest title to the land. Appellants contend that the evidence introduced requires the court of chancery to cancel and set aside these deeds as void, or, construed most favorably to appellees' interests, to reform said two deeds from Lines so as to hold that they conveyed two acres to Mary Lines and four acres to Lizzie Willey and Hattie Harvick in common.

The justice of the peace, George Stroup, who took the acknowledgment of the two Lines deeds, testified before the chancellor on this last hearing. It appears that he testified before the chancellor on the former hearing and that his testimony in the case was taken at one time before a notary public. He also signed a written statement on November 5, 1909, for attorney Thomas, one of the appellees. At this hearing in July, 1911, he stated that he would be seventy-eight years old the following month. About a year before the case was heard this last time he had a paralytic stroke, which he stated had affected his memory. His testimony on this hearing was to the effect that he had lived at Grayville, in White county, for the last three years but before that for twenty years had lived near Ellery, in Edwards county; that he had been justice of the peace for three terms and ran a mill within a short distance of Mr. Lines' home; that Mr. Lines came to him and told him there was to be an election for drainage officers, and as the candidate he favored lacked a few votes he (Lines) was going to make some, saying to the witness, "Come up; I want to make some deeds to the girls,—one for Lizzie, one for Hattie and one for Mary Lines;" that the witness went over and fixed the deeds up; that in about two or three weeks Mr. Lines came to him again and said, "You will have to do those things over,—the land is in the wrong district;" that shortly thereafter James Smerdon, then

working for Mr. Lines, took witness to Mr. Lines' house and he made the two deeds here in question; that before he made them he drew one incorrectly in the forenoon, which was destroyed, and he stayed to dinner and drew these afterwards; that Mr. Lines told him he wanted to give two acres to Lizzie, two acres to Hattie and two to Mrs. Lines; that the deed by which Lines obtained title to an undivided half of the eighty acres in question (called "the bottom eighty" in this record) was obtained from Judge Carroll C. Boggs in 1891; that the Boggs deed was brought out by Mrs. Lines and the first part of the description in each of the two deeds copied from it; that he intended, in writing these two deeds, to convey two acres to each of said three grantees; that upon witness stating that the description was somewhat indefinite, Mr. Lines said it did not make any difference,—the deeds were only to last until after the drainage election; that he (witness) had made a mistake in the date; that the year 1897 written in the deeds and acknowledgments should have been 1896; that he had discovered this mistake since he testified on the first hearing, by an examination of the drainage board record, which showed that the drainage election in question was in 1896; that he intended to date the deeds the day they were written, and did not know how he came to write the wrong year.

It appears that Mr. Stroup testified before the notary public that the deeds were intended to convey two acres to the wife and one acre to each of the daughters. In the written statement which he signed and gave Mr. Thomas the witness stated that he made the deeds to convey an undivided one-half interest in the eighty-acre tract to the wife, Mary Lines, and the other undivided one-half to Lizzie Merritt and Hattie Lines, for a consideration of one dollar for each deed, and that the deeds were delivered. On this trial he testified he did not know whether a dollar was paid or not; that he gave the deeds to Mrs. Lines or left them

on the table. The witness' statements at the various times he testified are not in entire harmony as to what he thought the deeds described, some of his testimony given at other times indicating that he thought the last part of the description was intended to convey land outside of the eighty acres in question.

James Smerdon testified that he was working for William Lines in 1896 and saw Mr. Stroup there drawing the deeds in March of that year; that he fixed the date by the drainage election; that he (witness) was feeding the stock when the justice came to the farm; that he heard Mr. Lines say to Mr. Stroup that he wanted to make some deeds to the women so they could vote at the election and beat Dan McCollom, and wanted to deed five acres apiece to his wife and each of the girls; that three deeds were prepared in the morning but described land outside of the drainage district; that witness was in the house until dinner time but did not remain there afterwards and did not hear the conversation about the second lot of deeds; that he took the girls and Mrs. Lines over to the drainage election in a wagon, and when they passed the bottom eighty the women folks laughingly pointed out where they owned the land, saying, "That is mine, over in that corner,"—one referring to the north-east corner and one to the south-east corner of the eighty; that in March, 1909, or thereabouts, he asked Mr. Lines to have Lizzie come and vote at an election where he (Smerdon) was running for commissioner in that district, and Mr. Lines said that she could not vote; that the deeds that Mr. Stroup made had been destroyed. The witness testified that Mr. Lines himself voted at the election.

J. M. Campbell stated that he had practiced law at Albion, Edwards county, forty-five years, and had been Mr. Lines' attorney during his lifetime and was the attorney of the executor up to the time this litigation started and was still acting for him in the probate court. He testified that shortly after Mr. Lines' death the appellee Lizzie Willey

brought him the two deeds in question and asked his opinion as to what to do with them; that she stated the deeds were made to enable her and her sister and mother to vote at the drainage election, and conveyed two acres to each of them; that he thought she said she had found them among her father's papers; that he told her he did not believe the deeds were of any account, or at least did not amount to enough to have a fuss over, but that he did not want to advise with her as a lawyer and thought she better consult her attorney, Mr. Strawn.

Jennie Goodman testified that Mrs. Willey told her the deeds had been made to get them to vote at a drainage election, and were no good, and J. D. McDermott testified that Mrs. Willey told him that if her father had only given her this bottom land she would be satisfied. There is other evidence that Mr. Lines said he was going to deed the land to his wife and daughters to enable them to vote at this drainage election. There is also testimony by other witnesses that Mr. Lines voted at many drainage elections in this district after 1896, and that he owned no other land in the district except this eighty acres. There is testimony, also, which tends to show that Mrs. Willey said that if the bottom tract did not bring more than \$60 an acre when it was sold after her father's death she would buy it herself. The testimony of the executor shows that Mrs. Willey was talking in October, 1909, after her father's death, about renting the bottom eighty from the executor; that when they had almost come to terms she requested him to delay the matter for a few days so that she could secure legal advice as to certain deeds; that he had never heard of her claiming under these deeds before that. Henry Ramsay said that he had negotiated with the executor as to Mrs. Willey's renting the eighty, and one day, while visiting her, he asked if she did not have some deeds to this land, and she said yes and showed them to him, and he told her she better get the advice of a lawyer with reference to them.

The evidence seems to show, without contradiction, that Mr. Lines rented out this land and paid the taxes on it from 1896 until about the time of his death, and that the executor sold what was raised on it the year Mr. Lines died, without objection on the part of Mrs. Willey or Mrs. Harvick. The evidence also shows that since 1909 appellees have had possession and worked and paid the taxes on said eighty acres.

The year before his death Mr. Lines had working for him a boy named Gumble. This boy's sister was living with Mr. and Mrs. Hinkle, at Fairfield. They both testified that they went over to visit Mr. Lines the Christmas before he died, and he told them he had deeded the eighty-acre tract to his two daughters. Charles Curtis, an uncle of the Gumble youth, testified that Mr. Lines told him several times that the bottom land belonged to his daughters. Mrs. Elizabeth Walters, who had lived for years a near neighbor to the Lines, testified that in March before Mr. Lines died she was at the house and he was hunting for a certain mortgage and note, and Lizzie found them in her trunk, along with the deeds here in question; that he told Lizzie to put the deeds to the bottom land away, as she might need them; that Mr. Lines was at her house three weeks before he died, and again told her he had deeded the bottom land to his daughters, Hattie and Lizzie. The daughter Lizzie appears to have lived with and taken care of her parents for a number of years before her mother's death, and after Mrs. Lines died kept house for her father until he died. The daughter Hattie stayed with her parents for some time during her widowhood, before she remarried. She did not testify on the last trial. An affidavit was presented asking a continuance on account of her absence. In order to avoid a continuance appellants agreed to admit her evidence taken on the former trial. She testified at that time that she visited attorney Campbell's office, in Albion, with her sister, and that when they asked what

they should do with the deeds he told them to burn them,—that they were no good; that he also advised them to see another lawyer. Appellee Lizzie Willey testified to the same effect as to their conversation with attorney Campbell. Mrs. Willey also denied the testimony given by Jennie Goodman and John McDermott. One witness testified on this last hearing that Mrs. Harvick had told him since the first trial that she was tired of this litigation and was not going to have any more to do with it; that her father never intended the daughters to have the land but simply made the deed to let them vote at a drainage election. The two daughters, appellees here, could only testify as to facts occurring after their father's death. The husband of Mrs. Willey was therefore an incompetent witness as to conversations he had had with Mr. Lines. *Heintz v. Dennis*, 216 Ill. 487.

We think it is clear from the testimony in this record that Mr. Lines did attempt to make some deeds to some of this bottom land so that his wife and daughters could vote at a drainage election in 1896. Whether these two deeds in question are the deeds that he made that year, on the testimony given, may well be questioned. The testimony of Mr. Stroup, the justice of the peace, given at various times, does not harmonize. Why he should have dated the deeds a year in advance is not apparent. From his testimony at these various times, given fourteen or fifteen years after the transactions occurred, it is evident that he is not clear as to what he did or why he did it. He did not attempt to explain the statement that he gave to appellee Thomas, except to say that he did not read it but it was read to him by Mr. Thomas. He did not claim that it was not read correctly. His testimony and Smerdon's differ in many of the material details as to what took place at the time the deeds were drawn. The other evidence as to these deeds is clearly conflicting and irreconcilable. It is argued by counsel for appellees that it might be harmonized by hold-

ing that the first set of deeds were drawn for the drainage election and that the deeds here in question were drawn after that contest. We are unable, however, to harmonize all the evidence in this record even on that assumption.

Appellants contend that the deeds were not delivered by Mr. Lines to his wife and daughters. The testimony introduced by appellants themselves is inconsistent with that contention, as well as that introduced by appellees. These deeds, duly executed, were found in the hands of the grantees, and there is a strong implication, therefore, that they were delivered, which can only be overcome by convincing evidence. (*Blake v. Ogden*, 223 Ill. 204; *Inman v. Swearingen*, 198 id. 437; *Potter v. Barringer*, 236 id. 224.) In cases of voluntary settlements the presumption in favor of the delivery of deeds is greater than in ordinary cases of bargain and sale. (*Thompson v. Calhoun*, 216 Ill. 161; *Latimer v. Latimer*, 174 id. 418; *Ward v. Conklin*, 232 id. 553.) The fact that the grantor retained possession of the property and received the rents during his lifetime, if the deeds were actually delivered, could not re-invest him with title. (*Potter v. Barringer*, *supra*; *Ward v. Conklin*, *supra*.) The usual rule is, that where there is a written agreement the whole sense of the parties is presumed to be comprised therein. (1 Story's Eq. Jur.—12th ed.—sec. 153.) Such instrument will not be changed unless fraud, accident or mistake can be established by the strongest and most convincing evidence. (*Hunter v. Bilyeu*, 30 Ill. 228; *Carson v. Davis*, 171 id. 497; *Stanley v. Marshall*, 206 id. 20; *Koch v. Streuter*, 218 id. 546.) If the mistake is conceded by both sides or proved by satisfactory evidence equivalent to an admission, courts of equity will not hesitate to reform a deed. The rule, however, forbids relief whenever "the evidence is loose, equivocal or contradictory, or is in its texture open to doubt or opposing presumptions. The proof must be such as will strike all minds alike as being unquestionable and free from reasonable doubt."

(1 Story's Eq. Jur.—12th ed.—sec. 157.) The authorities all agree that parol evidence of the mistake and the alleged modification must be of such a nature that the resulting proof "must be established beyond a reasonable doubt. Courts of equity do not grant the high remedy of reformation upon a probability nor upon a mere preponderance of evidence, but only upon a certainty of the error." (2 Pomeroy's Eq. Jur.—3d ed.—sec. 859.) The authorities cited (including decisions of this court) by both of the learned authors just quoted fully sustain the conclusions they have reached.

The first part of the description in the deeds conveyed, without question, the entire eighty-acre tract to the wife and two daughters of Mr. Lines. The evidence offered to reform this description by parol testimony is, to say the least, loose and open to doubt or opposing presumptions. Taking the whole record together, it cannot be said that the proof is such that it will strike all minds alike as "unquestionable and free from reasonable doubt."

• The six acres alleged by the bill to have been conveyed (instead of the entire eighty) by these deeds cannot be definitely located, either from that part of the description relied upon in the deeds or from any other evidence in the record. The second part of the description of the first deed attempts to convey four acres in the north-east corner of section 14, and the second part of the description in the second deed attempted to convey two acres in the south-east corner of said section 14. The record shows that testator did not own any land either in the north-east or south-east quarter of said section 14. The only parol evidence in the record attempting to locate by pointing out this property is the laughing remarks of the two daughters and their mother when they were driving to the drainage election. Manifestly, however, the witness who testified to these remarks did not attempt by his testimony to locate either of the pieces.

There is a further reason why it is impossible, under the law, to have these deeds either set aside or reformed, as prayed for in the bill. The law will not permit a party to convey his property for an unlawful purpose, and then, through the intervention of a court of equity, regain the same after the unlawful purpose has been accomplished. The law will leave him where he has placed himself. This rule applies not only to the grantor but to those in privity with him. If the allegations of the bill are true, the testator, William Lines, conveyed this property to his wife and daughters solely for the purpose of permitting them to vote at a drainage election. They could not vote legally at such election unless they actually owned the land. Neither he nor his heirs can come into a court of equity and have these deeds set aside or corrected on such a state of facts. *Jolly v. Graham*, 222 Ill. 550; *Decker v. Stansberry*, 249 id. 487. See, also, *Cosby v. Barnes*, 251 Ill. 460.

The chancellor saw the witnesses and heard them testify. He was in much better position to determine their credibility than is this court. The weight of the testimony is for the trial court, and a court of review will not reverse the findings of a chancellor unless, from all the evidence, it is clear that palpable error has been committed. (*Zimmerman v. Zimmerman*, 242 Ill. 552; *Klussman v. Wessling*, 238 id. 568.) Two chancellors at different times heard practically the same evidence in this case and in each instance dismissed the bill for want of equity.

In view of the rules of law governing the reformation of written instruments and the weight that should be given to the chancellor's findings, we are not disposed to disturb the decree, and it will accordingly be affirmed.

Decree affirmed.

THE CITY OF WAUKEGAN, Appellee, vs. GEORGE R. LYON
et al. Appellants.

Opinion filed February 23, 1912.

1. SPECIAL ASSESSMENTS—*void ordinance will not support new assessment for completed work.* Where the estimate of cost of an improvement exceeds \$100,000, the publication of the ordinance, as required by section 11 of the Local Improvement act, is essential to the validity of the ordinance, and if such section is not complied with the ordinance is void as to the property of objectors and will not support a new assessment against such property for completed work, under section 58 of said act.

2. SAME—*when judgment is res judicata as to the validity of ordinance.* A judgment dismissing a petition for confirmation as to the property of the objectors upon the ground that the ordinance was not published as required by section 11 of the Local Improvement act is, until reversed, *res judicata*, as between the parties, that the ordinance is void, notwithstanding the judgment contains the statement that the ordinance is "defective and insufficient for the purpose of said assessment," and such judgment is a bar to any attempt by the city to spread an assessment against the property which is based upon such ordinance.

APPEAL, from the County Court of Lake county; the
Hon. PERRY L. PERSONS, Judge, presiding.

ELAM L. CLARKE, COOKE, POPE & POPE, and HEY-
DECKER & PARMALEE, for appellants.

ARTHUR BULKLEY, (GEORGE A. MASON, of counsel,) for appellee.

Mr. JUSTICE COOKE delivered the opinion of the court:

The county court of Lake county entered a judgment confirming a new special assessment for completed work under an ordinance of the city of Waukegan, and this appeal is prosecuted from that judgment.

On July 9, 1906, the board of local improvements of the city of Waukegan presented to the city council an ordinance for a system of concrete sewers, together with an

estimate of \$108,212.75 as the cost of the improvement, of which amount there was estimated as necessary to pay the cost of making and collecting the assessment, the sum of \$6125.25. On July 16, 1906, the ordinance was passed by the city council and approved by the mayor. On March 23, 1909, the city of Waukegan filed its petition in the county court of Lake county for a special assessment under that ordinance. Objections were filed by the owners of a part of the property assessed for the improvement, and on May 4, 1909, the court sustained the objection that the ordinance had not been duly published according to the provisions of section 11 of the Local Improvement act. In its order the court found that "the ordinance herein is defective and insufficient for the purpose of said assessment, in that section 11 of the Local Improvement act of 1897 has not been complied with, and that said legal objections should be sustained," and decreed "that the legal objection that the ordinance herein was not duly published according to the provisions of section 11 of the Local Improvement act of 1897 be and the same is hereby sustained, and that the petition herein be and the same is hereby dismissed as to the property of said objectors." The city elected to proceed with the improvement, the contract for the sewer was let, and on October 13, 1910, the final estimate for work was approved by the board of local improvements. Thereafter, on December 30, 1910, the board of local improvements filed its certificate of the final completion and acceptance of the work, showing the cost of construction and the amount estimated by the board to be required to pay the interest on bonds and vouchers issued to anticipate collection, and showing the amount of the assessment as confirmed. On March 20, 1911, the city council passed an ordinance reciting the passage of the ordinance of July 16, 1906, the proceedings in the county court resulting in the confirmation of the assessment as to lands of non-objectors which were specially benefited, the letting of the contract

and the making of the improvement, that the work was done in good faith, that the county court held the prior ordinance insufficient for the purpose of such original assessment as to the property of objectors, so that the collection of the assessment as to such property had become impossible, and that a new assessment should be spread so that such property should be charged with its proportionate share of the cost of the improvement. The ordinance provided that a new assessment for \$13,618.15 be levied against the property objected for in the former proceeding. A petition was filed for a new assessment under the ordinance of March 20, 1911, and an assessment roll returned. Objections were made to the confirmation of this assessment, which, upon hearing, were overruled. The judgment of confirmation from which this appeal is taken was then entered.

It is first contended on the part of appellants that the original ordinance of July 16, 1906, is void and that no new assessment for completed work can be predicated upon it. On the hearing the order of May 4, 1909, was introduced in evidence without objection. The record of the city council relative to the passage of the first ordinance was admitted in evidence subject to objection, and the testimony of the city clerk and the publisher of a newspaper in the city of Waukegan that the ordinance and the proceedings of the city council were published less than one week before the passage of the ordinance was heard subject to objection. Appellee insists that none of the testimony objected to was competent, but it will not be necessary to pass upon that question, as in our judgment the order of May 4, 1909, is conclusive of the matter.

One objection made to the confirmation of the assessment in the former proceeding was, that the ordinance was not published as required by section 11 of the Local Improvement act. This objection was sustained and the petition dismissed as to the property of the objectors for that

reason. From that judgment no appeal was prosecuted, and the parties are bound by it. It is essential to the validity of such an ordinance, where the estimate of costs exceeds the sum of \$100,000, that it be published as required by section 11 of the Local Improvement act. If this provision is not complied with the ordinance is void and of no effect. (*City of East St. Louis v. Davis*, 233 Ill. 553; *Village of Bellwood v. Latrobe Steel and Coupler Co.* 238 id. 52.) A void ordinance will not support a new assessment for completed work under section 58 of the Local Improvement act, (*City of Chicago v. Hulbert*, 205 Ill. 346; *City of Chicago v. Galt*, 225 id. 368;) and the county court should have dismissed the petition herein.

The appellee contends that by the judgment order of May 4, 1909, the county court did not hold the ordinance void, but simply that it was defective and insufficient for the purpose of the assessment, and that by virtue of that holding it is now entitled to procure a new assessment for completed work under section 58 of the Local Improvement act. The essential part of the judgment order of May 4, 1909, is, that the objection that the ordinance was not published according to the provisions of section 11 was sustained and the petition dismissed as to the objectors for that reason. That judgment defined the character of that ordinance, and its effect is not altered by reason of the fact that the order contained a finding that the ordinance was defective and insufficient for the purpose of the assessment. That is an adjudication that the ordinance is void, and as that judgment stands unreversed, it is a bar to any attempt of the city to spread an assessment against the property of the objectors which is based upon that ordinance.

In view of the fact that there was no ordinance for the improvement it will not be necessary to notice the other questions argued by counsel.

The judgment of the county court is reversed.

Judgment reversed.

THE PEOPLE *ex rel.* John P. Martin, County Collector, Defendant in Error, *vs.* W. N. ROBESON *et al.* Plaintiffs in Error.

Opinion filed February 23, 1912.

1. TAXES—*when a certificate sufficiently complies with vote to levy tax to construct "gravel roads."* Where the petition, notice of election and the vote is for levying a tax to construct "gravel roads," a certificate of the highway commissioners levying a tax for constructing "hard roads" and referring to the vote upon the proposition is sufficient to sustain the tax, as a gravel road is a hard road. (*People v. Kankakee and Seneca Railroad Co.* 248 Ill. 114, explained.)

2. SAME—*copy of certificate of levy filed before taxes are extended is filed in time.* Where a certificate of levy is made in duplicate each paper is an original, and the filing of one of them with the county clerk does not satisfy the statute requiring the filing of a certified copy, but the paper so filed may be withdrawn and a certified copy filed in its place before the tax is extended thereon.

3. SAME—*when county clerk may put file-mark upon copy of a certificate of levy, on application for judgment.* If a certified copy of the certificate of levy of a tax to construct gravel roads is filed with the county clerk before the tax is extended but the clerk neglects to put his file-mark thereon, the court may, upon application for judgment and order of sale, permit the file-mark to be put on *nunc pro tunc* as of the day the copy was, in fact, filed.

4. SAME—*hard road tax may be levied from year to year during period.* While a levy for the full period for which a tax to construct hard roads is voted is not improper, yet there is no reason why levies cannot be made from year to year during such time.

5. SAME—*fact that town clerk copies certificate of levy in wrong book does not defeat tax.* The fact that the town clerk copies the certificate of levy of a hard roads tax in the town clerk's record instead of the highway commissioners' record does not defeat the tax.

6. SAME—*when complaint that method of proving proceedings was wrong cannot be made on appeal.* Where no objection is made in the trial court as to the method of proving what was done at the meeting of the highway commissioners at which a certificate of levy was made, complaint cannot be made, on appeal, that such method was wrong.

WRIT OF ERROR to the County Court of Lawrence county; the Hon. J. A. BENSON, Judge, presiding.

GEORGE W. LACKEY, for plaintiffs in error.

B. O. SUMNER, State's Attorney, and MCGAUGHEY & TOHILL, for defendant in error.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The county court of Lawrence county overruled objections of plaintiffs in error to the application of the county collector for a judgment against their lands for a delinquent special tax of the town of Allison for the construction and maintenance of hard roads, and rendered the judgment applied for, with an order of sale. A writ of error was sued out of this court by the plaintiffs in error, and they ask for a reversal of the judgment.

The objections presented in the brief and argument for plaintiffs in error are, that the certificate of the levy made by the commissioners of highways did not correspond with the petition or vote for the tax; that the original certificate of the commissioners was filed with the county clerk, and not a certified copy, as required by the statute; that these defects could not be cured by afterward filing a certified copy or by amendment on the hearing; that the oral evidence of what was done at the annual meeting of the commissioners, when the certificate was made, could not supply the place of the record, and that the levy was for only one year when it should have been for five years.

A petition, signed by twenty-five per cent of the land owners in the town of Allison who were legal voters, was filed with the town clerk, requesting him to give notice for a vote, at the annual town meeting in 1910, for or against levying a tax of one dollar on each \$100 assessed valuation of taxable property for the years 1910, 1911, 1912, 1913 and 1914, for the purpose of constructing and maintaining gravel roads on five public highways described in the petition. The town clerk gave notice in accordance with the

petition and the law, and at the annual town meeting the vote was in favor of the levy of the special tax. The commissioners of highways, at their meeting on September 6, 1910, made a certificate in duplicate, addressed to the town clerk, levying a tax of one dollar on the \$100 valuation for the purpose of constructing hard roads, referring in the certificate to the vote held in the town in conformity with the statute. The objection to the certificate is that the levy was for a tax for "hard" roads while the vote was for "gravel" roads. The statute authorizes the construction of hard roads of different kinds, and the land owners exercised their right to determine by their petition what kind of hard roads they would build. If the tax had been for a different kind of road or had authorized the expenditure of the tax for a different kind it would have been invalid, but that was not the fact. A gravel road is a hard road, and the certificate referred particularly to the vote, so that the money, when raised, could not be spent for constructing any other than gravel roads. The real infirmity in the tax held void in the case of *People v. Kankakee and Seneca Railroad Co.* 248 Ill. 114, was, that there never was a vote upon the proposition contained in the petition. The petition was for a tax to be used in constructing macadamized roads, but the notice for the vote, and the vote itself, was for levying a tax for the purpose of constructing and maintaining gravel, rock, macadam or other roads, for which there was no petition. It was held that the highway commissioners acquired no right to levy any tax because the question which the land owners authorized to be submitted was never voted upon at all. There was no authority to make any levy, and if the certificate had been for macadamized roads it would have been unauthorized, but it contained the same vice as the notice and vote in not following the petition. This is not a case where the commissioners attempted to levy a tax for a different purpose from that specified in the petition and vote. On the hearing the court

permitted an amendment of the certificate, but the amendment was not necessary, and whether it was properly allowed or not is immaterial.

The certificate of the commissioners having been made in duplicate, each paper was an original, and the town clerk, instead of making a certified copy, filed one of the original papers with the county clerk September 13, 1910. The paper filed did not appear to be a copy and there was nothing about it which would justify the county clerk in accepting or treating it as a copy, so that it was insufficient to authorize the county clerk to extend the tax. (*Cincinnati, Indianapolis and Western Railway Co. v. People*, 213 Ill. 197; *People v. Cairo, Vincennes and Chicago Railway Co.* 247 id. 327.) Afterward the town clerk was advised by counsel that filing the original was not a compliance with the law, and on December 16, 1910, before the tax was extended, he withdrew the original and filed a certified copy, as required by the statute. The county clerk extended the tax upon the tax books by virtue of this certified copy. The county clerk failed to put a filing mark on the certified copy, and on the hearing the court directed the county clerk to mark it filed *nunc pro tunc* as of December 16, 1910, which was proper. There was no time fixed by the statute within which the certificate was required to be filed, and if there had been, the failure to file it within such time would not affect the tax if it was filed before the tax was extended. *Buck v. People*, 78 Ill. 560; *Chiniquy v. People*, id. 570; *Moore v. Fessenbeck*, 88 id. 422.

Oral evidence of what was done at the meeting of the highway commissioners when the certificate of levy was made was admitted without objection, but it is now insisted that the acts of the commissioners could only be proved by their record, or that a record was necessary to sustain the tax. The town clerk did not make a record of the meeting in the highway commissioners' record but copied the certificate of levy in the town clerk's record. No ob-

jection having been made to the manner in which the proceedings were proved, complaint cannot now be made that the method was wrong, and the fact that the town clerk made a record of the proceedings in one book rather than another did not affect the tax.

It is objected that the tax ought to have been levied for the full five years, and it would have been proper to have done that. (*People v. Illinois Central Railroad Co.* 237 Ill. 154.) While such a levy would be unobjectionable, there is no reason why levies should not be made from year to year during the term, and it was not a valid ground of objection that more taxes were not levied than the one for which judgment was asked.

The judgment is affirmed.

Judgment affirmed.

MARY ANN ENRIGHT, Defendant in Error, *vs.* THE NATIONAL COUNCIL KNIGHTS AND LADIES OF SECURITY, Plaintiff in Error.

Opinion filed February 23, 1912.

1. BENEFIT SOCIETIES—*construction of member's contract is a question for the court.* The application for a benefit certificate, the physician's examination, the by-laws of the society and the certificate are all to be considered as the contract between the society and the member, and their meaning and construction are questions to be determined by the court.

2. SAME—*question as to diseases of applicant's relatives construed.* The question, "Have either of your parents, or any of your uncles, aunts, brothers or sisters, or other blood relatives, been afflicted with consumption, scrofula, cancer, insanity, epilepsy, gout, rheumatism, or any other hereditary disease?" does not mean that the diseases specified must have been hereditary, but is intended to require the applicant to state whether any of the relatives mentioned have been afflicted with any of the diseases specified, or any disease not specified which is hereditary.

3. SAME—*when false answer bars recovery.* Where the undisputed evidence shows that one brother and one first cousin of the insured, who resided in the same city with the insured, died of

consumption, there can be no recovery on a benefit certificate issued on an application containing a negative answer to the question whether any of the brothers or other blood relatives of the insured had ever been afflicted with consumption "or any other hereditary disease," there being no evidence tending to impeach the application, which was the basis of the certificate, nor to show that the insured did not give the answer therein contained.

WRIT OF ERROR to the Branch Appellate Court for the First District;—heard in that court on appeal from the Municipal Court of Chicago; the Hon. WILLIAM N. GEMMILL, Judge, presiding.

A. W. FULTON, for plaintiff in error.

FRANK F. ARING, for defendant in error.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The defendant in error, Mary Ann Enright, brought her suit in the municipal court of Chicago against the plaintiff in error, the National Council Knights and Ladies of Security, a fraternal benefit society organized under the laws of this State, on a certificate issued to her son, Thomas J. Enright, on August 7, 1907, and payable to her upon his death. The insured died of consumption on March 21, 1908, and the defense was, that in his application for the certificate he made an untruthful answer to the question whether his parents, or any of his uncles, aunts, brothers or sisters, or other blood relatives, had been afflicted with that disease, and therefore the plaintiff was not entitled to recover under the terms of the contract. The certificate was for \$3000, but it provided that if the insured should die within twelve months of its delivery the defendant should be liable for only seventy per cent of that amount. Upon a trial there was a verdict for \$2187.50, being seventy per cent of the total amount, with interest. The court overruled a motion for a new trial and entered judgment on the verdict.

The record was removed to the Appellate Court for the First District, where the judgment was affirmed by the branch of that court, and it has been brought to this court in pursuance of a petition for a writ of *certiorari*.

At the close of the evidence the defendant asked the court to direct a verdict in its favor, which the court refused to do, and the refusal was assigned for error in the Appellate Court. There was no controversy as to any material fact, and the rights of the parties depended upon the application of the law to facts which were not in dispute. The application for the certificate, the examination by the physician, the by-laws of the society and the certificate issued were all to be considered as the contract between the parties, and their meaning and construction were questions for the court. *Lehman v. Clark*, 174 Ill. 279; *Fullenwider v. Royal League*, 180 id. 621.

The application for the certificate contained this question: "Have either of your parents, or any of your uncles, aunts, brothers or sisters, or other blood relatives, been afflicted with consumption, scrofula, cancer, insanity, epilepsy, gout, rheumatism, or any other hereditary disease?" This question was read by the medical examiner to the applicant, and he answered, "No." The answer was written down and the application was signed by the applicant, who therein declared that the answers and statements, and the answers to the questions propounded to him by the medical examiner, were warranted to be true and fair. It was also therein agreed that the application should form the basis of the agreement and constitute a warranty, and that the application and medical examination should be considered a part of the beneficiary certificate. The certificate was issued in pursuance of the application, and provided that it was issued and accepted upon the said expressed warranties, conditions and agreements, and that the application and report of the medical examiner, which were made a part thereof, were true in all respects and should be held

to be a warranty and to form the only basis of liability of the order on the certificate. The by-laws also provided that no person, nor the beneficiaries named in the certificate, who should make any false representations in the application should be entitled to receive any benefits by reason of the certificate having been issued.

The answer was not true. Oliver Enright, a brother of the insured, had died on February 8, 1903, of acute military tuberculosis, which is a common name for consumption, and a contributing cause was dyspnoea, which means shortness of breath or difficulty of breathing. A cousin of the insured, whose mother was a sister of the plaintiff, died on November 15, 1904, of acute pulmonary tuberculosis, the common name of which is acute consumption. The insured died on March 21, 1908, of phthisis pulmonalis, the common and everyday name of which is consumption, and a contributing cause or complication was endocarditis, which means inflammation of the valves of the heart. According to the death certificates the duration of the disease in the case of the brother was four months and fifteen days, in the case of the cousin four months and in the case of the insured four months. The plaintiff called a witness who said that the insured did not read over the examination before signing it but that she heard the question asked, and there is nothing in her testimony or in the record tending in any degree to prove that the answer was not given as written down by the medical examiner and the application was not impeached in any manner whatever. The insured and his brother lived in Chicago, at 1127 West Congress street, and the cousin lived in the same city, at 290 California avenue, so that it is beyond question that the insured knew of the deaths of his brother and cousin and the nature of the long illnesses which preceded their deaths.

Counsel differ as to the construction of the contract on the question whether the false answer was a warranty of a

fact which under the law must be literally true, whether material or not, or was merely a representation of a fact which must relate to a matter material to the risk, (*Minnesota Life Ins. Co. v. Link*, 230 Ill. 273,) and they also differ as to whether the same rule, in the construction of doubtful or ambiguous terms, is to be applied to a fraternal beneficiary society as to a regular insurance company, but neither question is material. The municipal court took the view that the statements of the application were warranties. No instructions were asked by the plaintiff but the court gave instructions requested by the defendant in which the contract was so construed, and the jury were directed to find for the defendant if they believed, from the evidence, that previous to the time of application the applicant had one brother and one first cousin who died of consumption. There was no dispute as to the hypothesis of fact and the verdict was directly contrary to the instructions, but the court denied the motion for a new trial, to which defendant was clearly entitled on that ground if the instructions correctly stated the law. The Appellate Court regarded the statements as representations, but whether they were warranties, as was stipulated in the application and confirmed by the certificate and by-laws, or were representations, there could be no recovery on the undisputed facts. In any view of that subject the question and answer were material to the risk, and there is no ambiguity about the contract which could permit a construction giving a right to recover.

It is contended that the judgment was right because the ordinary and plain meaning of the words used to specify the diseases was limited or qualified by the words "or any other hereditary disease," and that it was necessary not only to prove that a brother and cousin had died of consumption, but that the consumption was of some kind that was hereditary and was not acquired by the brother and cousin. The Appellate Court adopted the view that in order to avoid liability on the certificate it was necessary to

show that the consumption of which the brother and cousin died was hereditary in them, and that the duration of the disease for four months, and fifteen days and four months, respectively, did not indicate that the disease was hereditary but rather that it was acquired. We have not found any evidence in the record that the disease was not hereditary and was acquired, but we regard the plain meaning of the question to be whether any of the specified relatives or blood relatives of the insured had been afflicted with either of the particular diseases mentioned, or with any other disease not mentioned that was hereditary. The question did not imply that the diseases mentioned were hereditary, and it would be irrational to say that the fraternal society was seeking information from the applicant as to whether gout, rheumatism or consumption were hereditary. What the society wanted to know and required him to answer was whether any of the relatives had had any of those particular diseases. As to other diseases he was not required to answer unless they were hereditary, which would exclude contagious or infectious diseases, and such others as were not considered hereditary and which were of no interest to the insurer.

We are referred by counsel to the decision in *Insurance Co. v. Gridley*, 100 U. S. 614, as justifying the interpretation claimed for the question. In that case the applicant answered that his brother had been temporarily insane; that the insanity was caused by the excessive use of intoxicants and the use of opium and morphine, and that recovery followed reformed habits in those respects. The inquiry as to diseases of the applicant was limited to such as were material to the risk, and the context justified the conclusion of the court that it was not intended to include such diseases as might exist in a dormant or inactive state without his knowledge or without discovery upon examination by the most learned physician. What was there said does not apply in any way to this case, where a statement which

was material to the risk was made which was untrue and where the applicant could not have been ignorant of the truth.

As there was no evidence tending to overcome the defense interposed, the court erred in refusing to direct a verdict and the Appellate Court erred in affirming the judgment.

The judgments of the Appellate Court and the municipal court are reversed.

Judgment reversed.

NORA BROWN, Appellee, vs. BERT BROWN, Appellant.

Opinion filed February 23, 1912.

1. WILLS—*when words will be construed as referring to time when estate will vest in possession.* Words declaring that a devise shall take effect after or upon the death of the tenant of a particular estate will ordinarily, if standing alone in the will, be construed as referring to the time when the estate will vest in possession.

2. SAME—*when title vests at once and the possession, only, is deferred.* Although a gift arises wholly out of directions to pay or distribute *in futuro*, yet if such deferment is not for reasons personal to the legatee or devisee but merely to let in a life estate, the vesting of the gift in remainder is not postponed but the title vests at once, and the possession, only, is deferred.

3. SAME—*courts are disposed to give an estate of inheritance to the first donee.* Courts are disposed to adopt such a construction as will give an estate of inheritance to the first donee.

4. SAME—*when clause does not divest remainder.* Where the testator devises a remainder in fee to his children at the death of the widow, a subsequent clause providing that if a certain son dies before the widow his daughter shall take no interest in the testator's estate does not operate to divest the son of the remainder devised to him.

APPEAL from the Circuit Court of Coles county; the Hon. W. B. SCHOLFIELD, Judge, presiding.

JOHN P. HARRAH, and A. C. ANDERSON, for appellant.

SUMNER S. ANDERSON, for appellee.

Mr. CHIEF JUSTICE CARTER delivered the opinion of the court:

This is an appeal from a decree entered in the circuit court of Coles county upon a bill for partition filed by appellee, Nora Brown. William F. Brown died testate, seized of a farm of about 120 acres situated in said county. His last will duly probated, after providing for the payment of his just debts and devising a house to his widow absolutely, reads as follows:

"Third—I hereby give, devise and bequeath all the rest and residue and remainder of my estate, real, personal or mixed or whatsoever, unto my beloved wife, Matilda C. Brown, to have and to hold the same to her own use for and during her natural life or so long as she remains my widow, and in the event of her re-marriage, then to have and take only such interest in the property, real, personal or mixed, mentioned in this clause of this will, that she would take under the statute should I have died intestate.

"Fourth—Upon the death or re-marriage of my said wife, then it is my will that my estate then remaining be divided between my lawful heirs, as provided by the statute of the State of Illinois, except as provided in clause 4½ of this will.

"Clause 4½—If my son Ramey Brown shall die before my said wife or before her re-marriage, then his daughter, Helen Brown, shall take no interest in any part of my estate but shall receive one dollar in lieu thereof."

The testator left him surviving his widow, Matilda C. Brown, and nine children. The widow died without re-marrying but lived longer than the son Ramey Brown. The latter, by his will, after providing for the payment of his just debts, etc., left ten dollars to his daughter, Helen, (his only heir-at-law,) and the balance of his property to his wife, the appellee, Nora Brown. The decree of the lower court found that Nora Brown was the owner of an un-

divided one-ninth interest in the farm sought to be partitioned, subject to certain liens.

The sole question to be decided is what interest Ramey Brown took under his father's will. It is conceded that if clause 4½ had been omitted he would have taken a vested interest in the farm. The rule is, that when the will speaks of a devise as taking effect after or upon the death of the tenant of the particular estate, such words will ordinarily, if standing alone in the will, be construed as referring to the time when the estate will vest in possession. (*Bates v. Gillett*, 132 Ill. 287; *Clark v. Shawen*, 190 id. 47.) Although the gift arise wholly out of directions to pay or distribute *in futuro*, yet if such deferment is not for reasons personal to the devisee or legatee but merely because the testator desired to appropriate the subject matter of the devise or legacy to the use and benefit of another for and during the life of such other, the vesting of the gift in remainder will not be postponed but the title will vest at once, only the possession being deferred. (*Knight v. Pottgieser*, 176 Ill. 368; *Carter v. Carter*, 234 id. 507.) The only object here in postponing the division of the estate was that the widow might enjoy it during her lifetime or widowhood. It is the disposition of the courts to adopt such a construction of a will as to give an estate of inheritance to the first donee.

The testator clearly by that part of the will before clause 4½ gave a vested interest in remainder to his nine children, including Ramey Brown. For some reason he intended to exclude his grand-daughter, Helen Brown, from all interest (except one dollar) in his estate. But this clause did not divest Ramey Brown of his interest. From this conclusion it necessarily follows that the will was properly construed by the trial court.

The decree of the circuit court will be affirmed.

Decree affirmed.

THE PEOPLE *ex rel.* John J. Mortell, Appellant, *vs.* ADOLPH BERGMAN *et al.* Trustees of Sanitary District of Chicago, Appellees.

Opinion filed February 23, 1912.

PRACTICE—*fact that validity of an ordinance of quasi municipal corporation is involved does not give Supreme Court jurisdiction.* The provision of the present Practice act authorizing a direct review by the Supreme Court of a proceeding in which the trial judge certifies that the validity of a "municipal ordinance" is involved was intended to include only city or village ordinances, and not the ordinances and resolutions of *quasi* municipal corporations, such as sanitary districts and the like.

APPEAL from the Superior Court of Cook county; the Hon. CHARLES A. McDONALD, Judge, presiding.

CALHOUN, LYFORD & SHEEAN, (EDWARD M. RAWLINS, of counsel,) for appellant.

JOHN C. WILLIAMS, and JAMES S. HANDY, (OSCAR H. OLSEN, of counsel,) for appellees.

Per CURIAM: This was a petition for a writ of *mandamus* and involves the validity of an ordinance passed by the trustees of the Sanitary District of Chicago, and reaches this court by direct appeal by virtue of a certificate of the trial judge that the validity of a municipal ordinance is involved and that in his opinion the public interest requires that said ordinance be passed upon by this court, which certificate was made under the provisions of section 118 of the Practice act, which provides that appeals from and writs of error to circuit courts and the superior court of Cook county shall be taken direct to the Supreme Court "in cases in which the validity of a municipal ordinance is involved and in which the trial judge shall certify that in his opinion the public interest so requires."

Prior to the passage of the present Practice act it had been held (*Wood v. City of Chicago*, 205 Ill. 70; *Masonic Temple Ass'n v. City of Chicago*, 217 id. 58;) that the fact that the validity of a city or village ordinance was involved did not give this court jurisdiction by direct appeal or writ of error, and the suggestion has been made that the amendment to the Practice act which authorizes appeals to and writs of error from this court to review judgments and decrees of the circuit courts and of the superior court of Cook county where the validity of a "municipal ordinance" is involved, upon the certificate of the trial judge, was intended to cover only the class of cases above referred to, and was not intended to include the review of ordinances and resolutions enacted or passed by the trustees of *quasi* corporations, such as boards of supervisors, county commissioners, park commissioners, drainage commissioners, highway commissioners and the trustees of a sanitary district. By the text writers corporations are divided, generally, into public and private corporations, and public corporations are classified as municipal and *quasi* municipal corporations, and a municipal corporation is said to be one created by government for political purposes, having subordinate and local powers of legislation, and that the word "municipal" applies strictly only to what belongs to a city. (Bouvier's Law Dict.) And again, the word "municipal" is defined as pertaining to a city or a community within a State, possessing rights of self-government. (Anderson's Law Dict.) We think it apparent from the condition of the law upon the subject and the language of the amendment which sought to change the law, that it was the legislative intent to only authorize the direct review by this court of city and village ordinances upon the certificate of the trial judge, and that this court has no power to review, by direct appeal or writ of error, the ordinance in question.

This court, therefore, being without jurisdiction to entertain this appeal, the cause will be transferred to the Ap-

pellate Court for the First District, and the clerk of this court will transmit the files to the clerk of that court.

Cause transferred.

ANN CLARY, Appellant, vs. EDWARD M. SCHAACK *et al.*
Appellees.

Opinion filed February 23, 1912.

1. MORTGAGES—*a sale by trustee in a deed of trust conveys the legal title.* A sale and deed made by the trustee in a deed of trust in the nature of a mortgage, even though without notice and in violation of the trust, is not void but conveys the legal title to the grantee and can be avoided only in equity.

2. SAME—*purchaser through trustee's sale does not take possession as mortgagee.* A purchaser at a sale by the trustee in a deed of trust in the nature of a mortgage, who dispossesses the mortgagor, does not take possession as a mortgagee but in the assertion of the rights of a purchaser, and such possession is adverse to the mortgagor and is the assertion by the purchaser of the extinguishment of the equity of redemption.

3. SAME—*when a promise to re-convey is not based upon any right of redemption.* Where a grantee of the purchaser at a trustee's sale under the trust deed dispossesses the mortgagor, his promise to let her have the property back if she will pay him a sum which was equal to twice as much as the mortgage debt and interest, cannot be said to have been based upon any right of redemption which he recognized.

4. SAME—*remedy where sale by trustee is irregular.* Where a sale by a trustee in a trust deed in the nature of a mortgage is made without notice and in violation of the trust, the mortgagor may, within a reasonable time, file a bill in equity to permit a redemption and require an accounting for rents and profits.

5. LACHES—*when right to compel redemption and accounting is barred.* A mortgagor who, with knowledge of the fact that the trustee has sold the land without notice to her, waits for a period of thirty-two years, until the principals in the transaction are dead, before asserting a right to redemption and accounting against the heirs of the real purchaser at the sale, who, together with their predecessor in title, have been in the adverse possession of the land for such period, is barred by her delay notwithstanding she alleges a conspiracy between the trustee and purchaser, which she avers she was ignorant of until just prior to filing the bill.

APPEAL from the Circuit Court of Cook county; the Hon. JOHN GIBBONS, Judge, presiding.

Ann Clary, on November 19, 1910, filed in the circuit court of Cook county a bill to set aside several conveyances of certain real estate and for other relief. The bill was dismissed upon demurrer for want of equity, and the complainant appealed.

The bill alleges that the complainant became the owner of the real estate in controversy, located at the north-east corner of North State and Chestnut streets, in the city of Chicago, on October 4, 1864, and occupied it with her family, as their homestead, until the great fire of October 9, 1871, destroyed the dwelling. After that event she and her children, her husband having died, were compelled to live elsewhere until 1876, when she purchased a two-story frame building, which she moved on the premises and occupied with her children. She was then forty-five years old, illiterate, ignorant of business, without means other than this real estate which had been conveyed to her by her husband, and she supported herself and her children by washing and ironing. The price of the building was \$330, and in order to pay for it she borrowed of Edward Knauer \$600, for which she gave him her promissory note due in three years, together with six interest notes, for \$30 each, for the semi-annual interest at ten per cent until the maturity of the principal note. The date of the transaction was August 16, 1876, and the loan was secured by a trust deed of the real estate in controversy with a power of sale, the property then being worth \$5000. Knauer had been and was at this time the friend, adviser and agent of the complainant, and he paid to her only \$54.65 in cash of the proceeds of the loan, retaining the price of the building, his charges, and \$100 to be applied on the interest notes when due. He told the complainant that she need not bother about the payment of any of the notes as he would look

out for her, and if she was unable to pay the notes when called upon, he would either take care of them himself or cause a new loan to be made, as the property was increasing in value so that a new loan could easily be obtained. The complainant frequently talked with Knauer about the loan, and he told her that everything was all right and she need pay no attention to the matter until he called upon her to do so. Relying upon these statements the complainant was lulled into security and had no fear of her rights being in any danger, but on December 7, 1878, she was forcibly ejected from the premises by certain persons claiming to be officers of the law and to have a writ authorizing such ejection, who said that Michael J. Schaack had become the owner of the premises. On inquiry of Knauer he informed the complainant that he had disposed of her notes to Andreas Michel, and that the latter, on account of an alleged failure to pay two of the interest notes, had caused the premises to be sold by virtue of the power of sale in the trust deed and had bought them at the sale on November 11, 1878, and obtained a deed therefor. Schaack told the complainant that he knew nothing about the matter except that he had bought the premises from Michel on November 14, 1878, for \$1400, and he threatened to make it hard for the complainant if she tried to make him trouble, but promised her that if she did not she could have the premises at any time upon payment of \$1400, and that in the meantime he would hold the title for her. Being ignorant of her rights and deterred from making full inquiry by reason of her confidence in the information and promises of Knauer and Schaack,—particularly in Schaack's, because of his high standing in police circles,—the complainant continued to work and save in order to accumulate sufficient money to pay Schaack and recover the premises, but after several years, when she had accumulated almost enough for this purpose, she heard of Schaack's death, and then, believing her rights in the property gone, she ceased

all thought or effort in regard to it until about two weeks before the filing of the bill, when she was advised to consult a lawyer. She did so, and through this source first obtained knowledge of the conspiracy between Knauer and Schaack whereby the sale of the premises was made without notice to her and without her knowledge. Knauer and Schaack having conspired to enable Schaack to obtain the property by having it sold without the complainant's knowledge, Knauer pretended to sell the complainant's notes to Michel, though, in fact, Schaack owned them, and no demand of payment was made upon complainant nor was notice given her of any default in the terms of the trust deed, though she was all the time relying upon Knauer's promises in regard to her notes, such promises having been made for the purpose of keeping her in ignorance of Knauer's acts and in furtherance of the conspiracy between him and Schaack, and no money was due nor was there any default in the payment of interest at the time of the sale. Michel was a police officer and a relative of Schaack, and acted under his directions without any interest in the transaction, merely permitting the use of his name. Schaack was present at the sale and bid for the property. He caused Michel to bid also, and, as pre-arranged, the property was sold to Michel on his bid of \$700, though no money was paid and the complainant received no credit for the surplus. Immediately after the sale, Knauer, as trustee, made a deed conveying the property to Michel, and the latter, three days afterward, conveyed it by special warranty deed to Michael J. Schaack and Christine Schaack, his wife, as joint tenants, the latter having knowledge of all the fraudulent acts in relation to the sale as well as of her husband's promise to hold the premises in trust for the complainant. Afterwards, on December 30, 1878, Knauer executed a second trustee's deed to Michel, which recited that it was made to supply defects in the prior deed, and "that said sale was made by reason of default having been made on the inter-

est notes falling due eighteen and twenty-four months, respectively, and that five weeks' notice of said sale being required, he did publish said notices in the *Chicago Legal News*, the date of the first publication being October 8, 1878, and the last November 2, 1878." In fact, no notice of the sale was published in the *Chicago Legal News* or in any other paper in Cook county.

By reason of the death of Michael J. Schaack and Christine Schaack, who died April 6, 1909, and the will of the latter, Charles W. Schaack and Edward M. Schaack have succeeded, jointly, to their title. None of them have ever resided upon the premises, but ever since the complainant was dispossessed they have collected the rents. The two-story frame building which complainant placed there in 1876 is still there and is now habitable and occupied by tenants, and on another part of the lot a three-story frame building has been built and is occupied but is old and of little value. The original loan, interest, taxes, cost of improvements and all other proper charges have been paid out of the rents, and Edward M. Schaack and Charles W. Schaack ought to be required to account to the complainant. The bill prays that the two trustee's deeds and the special warranty deed be set aside; that the trustee's sale be declared void; that an account be taken, and that upon the payment by the complainant of whatever, if anything, may be found due from her, the possession of the premises may be decreed to her. No copy of the trust deed, of either of the trustee's deeds or of the special warranty deed is shown in the record, nor are their contents in any material respect indicated more fully than has been already shown.

FREDERICK L. BROOKS, and LEMAN & RIGBY, for appellant.

VINCENT D. WYMAN, and OTTO W. JURGENS, for appellees.

Mr. JUSTICE DUNN delivered the opinion of the court:

The object of the bill was to have a decree that the trust deed had been satisfied by the receipt of the income from the property, and it was based upon the hypothesis that the trustee's sale was void, and that the grantees in the trustee's deeds acquired by them only a right of subrogation and occupy the position of mortgagees in possession. This claim is founded upon the allegation that no notice of the sale was given. The law is well settled in this State that a sale and deed made by a trustee in a trust deed in the nature of a mortgage, without the notice required by the terms of the trust deed and in violation of the trust, are not void but convey to the grantee the legal title, and can be avoided only in equity. (*Reece v. Allen*, 5 Gilm. 236; *Dawson v. Hayden*, 67 Ill. 52; *Cornell v. Newkirk*, 144 id. 241; *Rice v. Brown*, 77 id. 549; *Quinn v. Perkins*, 159 id. 572.) The remedy for a sale contrary to the terms of the trust deed is in equity, only. (*Graham v. Anderson*, 42 Ill. 514; *Koester v. Burke*, 81 id. 436; *Chapin v. Billings*, 91 id. 539.) The deed to Michel and the deed from him to the Schaacks conveyed the legal title to the premises, and it was by virtue of this title that Schaack took possession, and not as mortgagee. The averment is, that persons claiming to be officers of the law dispossessed the complainant, claiming to act under the authority of a writ, and saying that Schaack had become the owner of the property. Schaack never claimed as a mortgagee but only as owner, and his promises to the complainant to hold the title for her and let her have the property back, were based, not upon any right of redemption which he recognized, but upon the payment of a sum twice as great as her notes and interest amounted to. The possession so taken was adverse to the appellant in the assertion of the rights of the purchaser at the trustee's sale, and must be regarded as the assertion, by such purchaser, of the ex-

tinguishment of the equity of redemption. (*Walker v. Warner*, 179 Ill. 16; *Harter v. Twohig*, 158 U. S. 448; *McKesson v. Hawley*, 22 Neb. 692.) In the cases cited the sales concerned were admittedly void, yet in the latter case it was said by the Supreme Court of Nebraska: "Notwithstanding the fact that the foreclosure proceeding might have been void, it is clear that the purpose of such proceedings was to cut off and destroy the title of plaintiff, and therefore the conveyance by the trustee to Hartley, had it been legal, would have terminated the plaintiff's title. The grantees of Hartley taking and holding the property or asserting their right to hold it under warranty deeds from him was clearly adverse to plaintiff. They held as owners and the statute would run in their favor."

It is true, the sale was irregular and the Schaacks might have been compelled, in equity, to permit a redemption and to account for rents and profits. Had complainant then filed a bill for that purpose she would have been entitled to an answer from the defendants. She did not see fit to do so, but with full knowledge herself waited thirty-two years until the principals in the transaction have long been dead. Witnesses having any knowledge of the transaction may have forgotten it or died, and documents relating to it may have been lost or destroyed. Under such circumstances defendants are not required to search the past for such fragments of evidence as a previous generation may have left, to defend their title. The equitable doctrine of *laches* applies to such cases. (*Hamilton v. Hamilton*, 231 Ill. 128; *Moore v. Taylor*, 251 id. 468.) That a mortgagor who omits for years, without any reasonable explanation, to question a sale which, though voidable, is not void, will be held to have waived the irregularities and acquiesced in the sale is familiar doctrine. The defendants and their predecessors in title have been in the adverse possession of the premises many years beyond the longest period of limitation recognized by the statute. This long continued ac-

quiescence by the complainant clearly appearing in the bill, for which no excuse which can be regarded as reasonable is offered, constitutes such *laches* as to bar any claim to equitable relief, and this defense may be made by either general or special demurrer. *Kerfoot v. Billings*, 160 Ill. 563.

The bill alleges that Knauer and Schaack conspired against the complainant. No harm came or could have come to her through the assignment of the notes to Michel while Schaack was the real owner. The failure of Knauer to keep his promise to take care of the interest, and the sale without notice, were harmful to her. But she knew of these things in December, 1878. She knew that the \$100 retained by Knauer for the purpose of paying interest was \$20 short of the amount which would be due August 16, 1878. She knew that her property had been sold under the trust deed. The trustee's deed was recorded, and showed then what it shows now in regard to the notice. Nothing was concealed from her. Schaack's threat to make it hard for her if she attempted to make him trouble is at least capable of the interpretation that he would resist litigation as strenuously as he could. The bill contains the allegation that she first obtained knowledge of the conspiracy between Knauer and Schaack about two weeks before the bill was filed, but the other averments of the bill show that she knew, or could have learned, all the facts material to her rights within a few weeks after the sale. No legal reason is shown for her failure for so many years to make any effort to ascertain her rights.

The demurrer to the bill was properly sustained.

Decree affirmed.

THE PEOPLE *ex rel.* W. H. Stead, Attorney General, *et al.*
Appellants, *vs.* THE SPRING LAKE DRAINAGE AND
LEVEE DISTRICT *et al.* Appellees.

Opinion filed February 23, 1912—Rehearing denied April 3, 1912.

1. JUDGMENTS AND DECREES—*consent decree is conclusive upon the consenting parties.* A consent decree is based upon the agreement of the parties, which may supersede both pleadings and evidence and even go to the extent of pointing out and limiting the relief to be granted; and such a decree is conclusive upon the consenting parties and cannot be amended or varied without a like consent, nor can it be appealed from or reviewed by writ of error.

2. SAME—*what is not strictly a consent decree.* A decree dismissing a bill in equity "as per the following stipulation now filed herein" is not a consent decree to the extent that the terms of the stipulation must be regarded as embodied in the decree and the stipulation be regarded as *res judicata* of the matters therein contained, even though a copy of the stipulation was entered on the records of the court, where the court was not asked to approve the terms of the stipulation and enter the same in the form of a consent decree, except as to the order of dismissal.

3. STIPULATIONS—*a stipulation is unlike ordinary contracts.* A stipulation concerning a cause pending in court is unlike ordinary contracts between parties not in court, as no consideration or mutuality is required and it may bind those incapable of binding themselves out of court and is subject to the supervision of court.

4. SAME—*stipulations by parties or their attorneys will be enforced.* Stipulations entered into by parties to a suit or their attorneys in respect to the conduct or control of their rights in the trial of the cause will be enforced by the courts unless they are unreasonable or contrary to public morals; and it is the policy of the courts to enforce stipulations fairly made, unless good cause is shown to the contrary.

5. SAME—*power of court to enforce stipulation.* The power of a court to enforce, in a summary manner, a stipulation concerning the conduct of a suit exists while the court has jurisdiction of the cause, and even though such power may be lost with the termination of jurisdiction of the parties and the cause, yet a stipulation touching a party's substantial rights may be enforced by an independent action at law or appropriate remedy in equity.

6. SAME—*courts look with favor upon stipulations designed to simplify litigation.* Courts look with favor upon stipulations de-

signed to simplify, shorten or settle litigation and save costs to the parties, and will, when called upon in an appropriate manner, whether by a summary method in a pending cause or in an independent action, compel parties to observe them, unless they are illegal or contrary to public policy.

7. DRAINAGE—*powers of drainage district.* A drainage district organized under the statutes of Illinois is a municipal corporation for a special and limited purpose and has such powers as are deemed essential for the accomplishment of its objects.

8. SAME—*a drainage district has the power to make necessary contracts.* The chief distinction between a municipal corporation proper, and a *quasi* municipal corporation, such as a drainage district, is, that the former, only, has power to make local laws; but both classes have an implied power to make contracts necessary to enable them to exercise the powers and perform the duties which are conferred upon them by law.

9. SAME—*the authority of drainage commissioners to contract.* Under section 28 of the Levee act a drainage district, by its commissioners, has power to contract and be contracted with and to do and perform "all such acts and things as may be necessary for the accomplishment of the purposes of this act," and a contract by the commissioners is therefore not unauthorized unless the subject matter is wholly foreign to such purposes.

10. SAME—*when validity of stipulation must be tested as of the date when filed.* The validity of a stipulation between drainage commissioners and the Attorney General, relative to the dismissal of a suit to enjoin further work in the district, will be tested as of the date the stipulation was filed by the parties and the dismissal of the bill procured, and if the parties then had power to enter into it, it is immaterial whether or not it would have been enforceable at the time it was tentatively agreed to. (*Badger v. Inlet Drainage District*, 141 Ill. 540, distinguished.)

11. SAME—*when subject matter of a contract is not foreign to purposes of district.* An agreement by drainage commissioners to modify the plans of the district by constructing a levee and lock, so that the public right of navigation will not be cut off in a certain body of water, and to dredge out a channel below the dam and keep the same in repair, concerns a subject matter within the purposes for which the district was organized.

12. SAME—*when stipulation for dismissing bill is binding.* A stipulation between drainage commissioners and the Attorney General whereby a suit by the latter to enjoin further work in the district as an interference with navigation was to be dismissed if the commissioners would modify their original plans, with the approval

of the county court, after notice and a hearing, so as to provide, without increasing the cost to the district, a method of keeping such navigation open, is within the power of the parties, and, when duly carried out according to its terms, is binding upon them.

13. PUBLIC OFFICERS—*Attorney General has power to dismiss a suit, with or without stipulation.* The Attorney General is the representative of the people and may make any disposition of a suit brought by him which he deems to be for the best interest of the State, and may dismiss such a suit, with or without a stipulation.

APPEAL from the Circuit Court of Tazewell county; the Hon. T. M. HARRIS, Judge, presiding.

W. H. STEAD, Attorney General, THOMAS E. DEMPCY, JUNE C. SMITH, and GEORGE B. FOSTER, (NOLEMAN & SMITH, of counsel,) for appellants.

PRETTYMAN, VELDE & PRETTYMAN, POTTS & CONAGHAN, and W. R. CURRAN, for appellees.

Mr. JUSTICE VICKERS delivered the opinion of the court:

Two suits in equity were pending in the circuit court of Tazewell county, both of which involved substantially the same questions and the same parties. The causes were consolidated and heard together and a decree rendered which determined the questions involved in both causes. One of these bills was filed by the Spring Lake Drainage and Levee District and others against the Canal Commissioners of the State of Illinois, W. H. Stead, Attorney General, and others, and its purpose was to enjoin the defendants from interfering with the drainage district in the construction and completion of a levee or embankment across the natural outlet of Spring lake. The other bill was filed by the Attorney General and the Canal Commissioners, and its purpose was to enjoin the drainage district from constructing certain levees and embankments, the effect of which would be to destroy navigation upon Spring lake. The result of the hearing of the consolidated case was the rendi-

tion of a decree dismissing the bill filed by the Attorney General and others for want of equity and granting the relief prayed for in the bill filed by the drainage district. The present appeal is prosecuted by the complainants below in the bill filed by the Attorney General and the defendants below in the other bill.

Since all of the questions and the material facts necessary to their determination are fully presented in the proceeding by the Attorney General for an injunction against the drainage district, it will only be necessary to treat the consolidated cases as one case, and in so doing the People of the State of Illinois, represented by the Attorney General, and the Canal Commissioners of the State of Illinois, will hereinafter be referred to as appellants, and the commissioners of the drainage district will be referred to as appellees.

In order to understand the nature of this controversy it will be necessary to give a general description of Spring lake and the territory surrounding it, which are embraced within the boundaries of Spring Lake Drainage and Levee District.

Spring lake is a body of water about nine miles long and from one hundred yards to a half mile in width in its natural condition. The lake extends north-easterly and south-westerly, almost parallel with the eastern bank of the Illinois river but at some distance therefrom. At the southerly end the lake is connected with the Illinois river by an outlet extending easterly for about a quarter of a mile, thence turning northerly into the lake proper. Between the lake and Illinois river there is a large body of swamp land, containing about fourteen thousand acres, which is embraced within the drainage district. Substantially all of this body of land is subject to overflow from the Illinois river at times of extreme high water. The object in organizing the drainage district was to reclaim the lands lying between the Illinois river and Spring lake, and other ad-

jacent swamp lands, by the construction of a levee on the southerly bank of the Illinois river and across the southerly outlet of Spring lake to the bluffs, and construct ditches and establish a pumping station to pump the water out of the basin enclosed within the levee and the bluffs south-easterly of Spring lake. In 1877 the legislature of the State made an appropriation for the construction of what is known as the Copperas Creek lock and dam in the Illinois river, which was constructed about three miles north of the point where the outlet of Spring lake connects with the river. After the Copperas Creek dam was constructed a wing dam was built connecting with said dam and extending south-easterly across the low lands between Spring lake and the river and across Spring lake to the bluffs, in order to impound the water above the Copperas Creek dam and thereby raise the water level in the Illinois river. The effect of constructing the wing dam from the Copperas Creek lock to the bluffs and across Spring lake was to prevent boats of any considerable draft from entering the lake through its natural outlet or from passing from the lake over the wing dam to the river. In order to obviate this difficulty and to re-establish navigation on Spring lake in connection with the Illinois river, the legislature appropriated \$6200 out of the net revenues received by the canal commissioners for the purpose of constructing a canal from the Illinois river to Spring lake above the Copperas Creek dam. In pursuance of this act of the legislature the canal commissioners constructed a canal from the northerly end of Mud lake to the Illinois river. This canal was completed in 1879 and afforded a channel for navigation from the Illinois river through the canal to Mud lake and thence through Mud lake to Spring lake, these two lakes being connected in their natural condition. This canal entered the Illinois river seven or eight miles above Copperas Creek lock and dam, and was used, after its completion, as a means of ingress and egress between the river and Spring

lake by steamboats and other water crafts navigating the Illinois river and Spring lake. This canal remained open until the summer of 1909, when a dike or levee was constructed across the same by appellees near the Illinois river, thereby again cutting off Spring lake from any connection with the Illinois river. In 1903 the Spring Lake Drainage and Levee District was organized under the Levee act of Illinois. The district as originally organized included the land lying adjacent to and on both sides of the canal, and also the lands lying between the Illinois river and Spring lake from a point between the northerly end of said lake to a point between the wing dam and the Copperas Creek lock and the outlet of Spring lake to Illinois river at the southerly end. The plans for the drainage of this district included the construction of a levee along the southerly side of the Illinois river and across the canal, and also across Spring lake at the southerly boundary of said district, so as to connect with the bluffs beyond the lake and drain the waters from the lake and wholly destroy navigation thereon. In July, 1905, the Attorney General of the State, on the information of divers parties, filed an information in the nature of a bill in equity in the circuit court of Tazewell county against the Spring Lake Drainage and Levee District and the commissioners thereof, alleging that Spring lake was a navigable body of water the title to which was in the State of Illinois, and alleging that appellees were threatening to construct a dike across the canal connecting the said lake with the Illinois river, and praying that the appellees be perpetually enjoined from so constructing the said dike across the canal or otherwise obstructing or interfering with the free passage of canal boats and other water crafts through said canal and on Spring lake, and from draining or lowering the water in Spring lake or interfering with navigation thereon. Appellees were served with process and appeared in said cause and filed their general and special demurrer to the infor-

mation. While the cause was pending on demurrer, all of the parties in interest entered into a written stipulation which was intended to be a settlement of all questions involved in the suit then pending. This stipulation was properly entitled in the cause then pending, and after such title is as follows:

"And now on this day, this cause coming on to be further heard, come again all the parties herein, as heretofore, by their respective solicitors, and now, by agreement of all the parties in the above entitled cause, this cause is now dismissed as per the following stipulation now filed herein, which is in words and figures as follows, to-wit:

"Whereas, there is now pending in the circuit court of Tazewell county, in the State of Illinois, a certain information in equity brought by William H. Stead, Attorney General, for and on behalf of the People of the State of Illinois, and the Canal Commissioners of the State of Illinois, on relation of John Bolander, Edward Bolander, Edward S. Haas, John Huddleston, J. M. Brewer, Edward Bailey, J. C. Losch and Henry Lemm, of said Tazewell county, Illinois, against the Spring Lake Drainage and Levee District in Tazewell county, in the State of Illinois, and Howell J. Puterbaugh, Leonard L. Preston and Joseph Dailey, commissioners of the Spring Lake Drainage and Levee District of Tazewell county, in the State of Illinois, asking certain relief as therein prayed and for an injunction against said defendants to restrain and enjoin them from obstructing, hindering or interfering with the passage of canal boats through the channel from the Illinois river to said Spring lake, and from obstructing or interfering with the navigation and free passage of canal boats and other water crafts upon the water of said Spring lake, and from draining the water from or lowering the water level in said Spring lake, and for certain other relief as therein prayed.

"Now, therefore, for the purpose of settling said litigation to the satisfaction of all parties concerned therein, it

is hereby mutually agreed and stipulated by the parties to said suit as follows: That the plans of said drainage district shall be modified, under the order and direction of the county court of said Tazewell county, so as to provide for a lock in the main channel of Spring lake where the levee upon the south side of said district, as hereinbefore located, crosses said main channel of said Spring lake, of the capacity of thirty-six feet in width by one hundred and fifty feet in length, to accommodate water crafts navigating said Spring lake, and said lock shall be controlled and operated by the said drainage district so as to afford free passage to all boats navigating said Spring lake, without charge for lockage; and upon the construction of the said lock the artificial channel cut and constructed by the Canal Commissioners of the State of Illinois from the Illinois river to afford communication with the Spring lake shall be closed by said drainage district, and the levee built over the same and the levee on the south side of said district, as heretofore planned, shall extend to the bluff on the east side of said lake, and the levee provided for in said original plans to extend from near the south-east corner of said district to Marshall Landing shall be dispensed with and need not be constructed.

"It is further agreed that said drainage district will open the channel of said Spring lake from the mouth of the old Spring lake to Marshall's Landing and bear one-half of the expense of maintaining said channel, Smith-Hippen Company paying the other half of the expense, as provided for in a certain agreement entered into in writing by the commissioners of said Spring Lake Drainage and Levee District in Tazewell county, in the State of Illinois, with Smith-Hippen Company.

"It is agreed that any of said relators owning lands situated above high-water mark on the east side of said district which have not been overflowed by the highest water and which it is claimed will receive no benefit from the

drainage and other improvements of said district, shall submit to the county court of Tazewell county their petition to have said lands released from the assessment heretofore made and that no objection on account of the Statute of Limitations will be made by said commissioners to such petition, and that the court shall pass upon the matter and adjust such assessment as it may deem equitable and just.

"It is further agreed that upon the carrying out of this agreement by the commissioners of the said Spring Lake Drainage and Levee District in Tazewell county, in the State of Illinois, by modification of the plans of said district as above indicated, and a decree of the county court being entered on the petition of said land owners owning lands which are above high-water mark adjusting or modifying the assessment of the said lands, the suit in equity brought by the Attorney General above mentioned shall be dismissed.—October 30, 1905."

The stipulation was signed by William S. Kellogg, attorney for the commissioners of Spring Lake Drainage and Levee District in Tazewell county, in the State of Illinois; Prettyman & Velde, attorneys; William A. Potts, attorney for John Huddleston, J. M. Brewer, Edward Bailey, George Himmel, Mary Marshall Stout and W. G. Proctor; and William H. Stead, Attorney General.

After the terms of this stipulation had been agreed to, appellees petitioned the county court of Tazewell county to modify the plans of said drainage district so as to authorize the construction of the work required by the terms of said stipulation. The petition of the commissioners filed in the county court set up the stipulation and alleged that the modification was for the best interest of all concerned. The petition was sworn to by the commissioners, (two of whom are still members of the board and appellees herein,) and the prayer of the petition was, that the plans of the district be modified so as to conform to the said stipulation and authorize and direct said commissioners to construct the

lock and maintain the same as provided for in said stipulation. The petition was accompanied by plans, specifications, reports and estimates prepared by the engineer of the appellee district. The estimate of the cost to the district of building the lock, improving the channel of Spring lake and the additional levee work required by the stipulation was \$49,740. The work that was eliminated by the stipulation was estimated by the engineer at the same amount, \$49,740. In other words, the work required to be constructed by the district under the stipulation would cost the district nothing in addition to the amount that would be required if the original plans of the district were carried out. Upon the hearing in the county court the county court made the following finding: "And it further appearing to the court that the saving to said district by the elimination of the works and improvements above referred to and hereby ordered will equal the cost of said lock and other works and improvements provided for in this decree in lieu of said works and improvements eliminated, and that the said original assessments of benefits to said lands benefited will in each and every instance be unaffected by said changes and modifications of the original plans and specifications of the works and improvements of said district, and the lands of said district will be equally benefited, in every instance, the same as by the said original plans, and that no change in any of said assessments should be made by reason of the change in the plans herein provided for the works and improvements of said district." After the hearing in the county court upon the proposed modification of the plans of the improvements, and after that court had entered its decree, which shows that all of the land owners of the district had been properly notified of the filing of said petition, and said decree had become final, said stipulation was filed in the circuit court of Tazewell county and the order dismissing the original suit of the Attorney General was entered on December 26, 1905. After the chan-

cery suit was dismissed, in 1905, the work of the drainage district proceeded and a large amount of money was expended in the construction of a levee on the southerly bank of the Illinois river, which was extended across the canal, as was contemplated should be done by the stipulation. Nothing appears to have been done by appellees with reference to the construction of the lock for the Spring lake dam. In 1909 the commissioners again applied to the county court for an order enlarging and extending the boundaries of the drainage district, and an order was entered in the county court changing the boundaries of the district so as to take in all of Spring lake, including the outlet at the southerly end thereof, to the Illinois river. After this order was made appellees repudiated the stipulation and were threatening to extend their levee across the southern outlet of Spring lake, thereby wholly disregarding the stipulation and attempting to carry out the original scheme of damming up Spring lake at both ends and pumping the water thereof out into the Illinois river. The bill filed in the present case by appellants seeks to enjoin appellees from thus destroying or interfering with navigation upon Spring lake, and particularly from obstructing the southerly outlet thereof by the construction of the proposed levee across the same. The allegations of the bill in the present cause are, in substance, the same as the original bill that was dismissed in December, 1905, with the exception that in the present bill the stipulation is set up and relied on as additional ground of relief.

Appellants make three principal contentions in support of their bill: First, it is contended that the stipulation under which the original bill was dismissed was an adjudication of all the questions in controversy between the parties and affords sufficient ground for equitable relief; second, appellants contend that the evidence shows that Spring lake was meandered by the government, and that the title to the bed of the lake is in the State of Illinois in trust for the

use of the public; third, it is contended on behalf of the State that Spring lake in a state of nature is a navigable body of water, and that the public have the right of navigation upon the same without regard to the ownership of the bed of the lake, and that appellees have no right to interfere with or obstruct navigation thereon. There are some other minor matters relating to the procedure that are discussed by the parties in their briefs, but in the view that we take of this controversy it will not be necessary to refer to or discuss those questions.

Appellees' answer to appellants' first contention is, that the stipulation set up in the bill was *ultra vires* and therefore void and unenforcible, but it is conceded by appellees that if said stipulation was valid and binding the present proceeding is the proper one for its enforcement. The answers to the second and third contentions are, that they are not supported by the evidence. It is apparent that if either of appellants' contentions is sustained the decree below is erroneous and will have to be reversed.

The validity of the stipulation under which the original suit was dismissed is challenged by appellees as being *ultra vires* the drainage district, and also as being in excess of the powers and authority of the Attorney General. The determination of the questions raised in regard to the validity of the stipulation involves the consideration of several matters. At the very threshold of the controversy in respect to the stipulation we are met with a preliminary question concerning the legal status or character of the instrument under which the original suit was dismissed. Appellants contend that the decree dismissing the suit "as per the following stipulation now filed herein," followed by a recorded copy of the stipulation in the records of the court, makes all of the terms and provisions of the stipulation a part of the decree of the court and imparts thereto the effect and vitality of an adjudication of all matters therein recited, in support of which the rule of *res judicata* may

be invoked to the same extent and with like effect as if the cause had been heard and a formal decree entered embodying the provisions of the stipulation. On the other hand, appellees contend that the instrument is not a decree in any sense; that it is merely a contract entered into between the parties, and that its legality, as well as its interpretation and effect, is to be determined by the rules applicable to contracts *inter partes*. In the view that we have of this preliminary question the contention of neither party can be sustained to the full extent insisted upon. The terms of this agreement were fixed by the parties, and the court was not asked to approve those conditions and enter the same in the form of a consent decree, except as to the order of dismissal. The legal character of this writing is indicated by the name which the parties have given to the document. It is called a "stipulation," and such appears to be its proper legal character. A decree is the sentence or order of a court of chancery determining the rights of the parties to a suit pending, according to equity and good conscience. Ordinarily the decree is based upon the proofs and the pleadings. A consent decree is one based upon the consent or agreement of the parties, which may supersede both pleading and evidence and even go to the extent of pointing out and limiting the relief to be granted. Such a decree is absolutely conclusive upon the consenting parties and cannot be amended or varied without like consent, nor can it be re-heard, appealed from or reviewed upon writ of error. (*Schmidt v. Oregon Gold Mining Co.* 28 Ore. 9; 52 Am. St. Rep. 759.) It would seem to require no argument to show that the instrument under consideration is neither a decree nor is it a consent decree. On the other hand, it is not to be tested exclusively by the rules applicable to simple contracts. It was, as the parties very appropriately recited in the instrument, "a stipulation," and was entered into between the duly authorized attorneys representing parties to a pending cause in equity, for the pri-

mary purpose of terminating the pending litigation upon terms of mutual concession and obligations between the parties. A stipulation concerning a pending cause in court is an obligation unlike ordinary contracts between parties not in court. (*Ward v. Clay*, 82 Cal. 508; *Barry v. Mutual Life Ins. Co.* 53 N. Y. 536.) Since no consideration is necessary to its validity (*Howe v. Lawrence*, 22 N. J. L. 104,) no mutuality is required, and it may bind those incapable of binding themselves out of court and is subject to the supervision of the court. (20 Ency. of Pl. & Pr. 607.) All stipulations entered into by parties or their attorneys in respect to the conduct or control of their rights in the trial of a cause will be enforced by the courts in a summary manner unless such stipulations are unreasonable or contrary to public morals. Thus, a party to a pending litigation may waive, by stipulation, his statutory or constitutional rights and the court will hold him bound by such stipulation. Parties may waive the issuing and service of process, (*Stone v. Bank of Commerce*, 174 U. S. 412,) and may make a valid stipulation that the judgment in one suit shall abide the event of another suit pending between them, involving the same questions. (*Dilworth v. Curts*, 139 Ill. 508.) It is the policy of courts to enforce stipulations fairly made between attorneys or parties, relating to the conduct of suits, unless good cause is shown to the contrary. (*Chicago and Northwestern Railway Co. v. Hintz*, 132 Ill. 265.) In the *Hintz* case, above cited, the parties, through their attorneys, stipulated in the Appellate Court that the appellant might have until a certain day to file its briefs, with the proviso that if the cause was reached upon the call and the briefs had not been filed ten days before the cause was reached on the calendar the judgment should be affirmed. The briefs had not been filed ten days when the case was reached on call. Appellant had filed a writing purporting to recede from the stipulation. The Appellate Court enforced the stipulation by affirming the

judgment without reference to its merits, and the judgment of that court was affirmed by this court. The benefit of a stipulation made in the progress of a cause in court is usually obtained by calling the court's attention to the stipulation and asking the court to compel the party to observe the terms thereof. (20 Ency. of Pl. & Pr. 668.) The power of the court to attach an attorney and thus compel him to comply with his stipulations has been sustained. (*Blain v. Patterson*, 47 N. H. 523; *Masterson v. Bockel*, 20 Tex. Civ. App. 416.) The foregoing rule is only applicable to cases pending and undetermined, and the power and jurisdiction of the court to enforce stipulations in a summary manner in the course of a proceeding would cease with the termination of jurisdiction over the cause and parties. Where, by reason of the stipulation or otherwise, the court had lost jurisdiction of the cause, it may well be doubted whether the power of the court could again be invoked, in a summary proceeding, to compel the observance of the terms of a stipulation, but it is not necessary to determine that question here. The law is well settled that a stipulation touching a party's substantial rights may be enforced by an action at law or by a suit for injunction or other appropriate remedy in equity. (20 Ency. of Pl. & Pr. 669, and cases there cited.) Whether the aid of the court is invoked by some summary method during the pendency of the cause or by a resort to another independent action, courts look with favor upon stipulations designed to simplify, shorten or settle litigation and save costs to parties, and will, when called upon in any appropriate manner, compel parties to observe such stipulations unless they are illegal or contrary to public policy. The instrument executed by the parties hereto is not a decree of the court in any proper sense of that term, and it differs from an ordinary simple contract in the particulars above pointed out.

We are next to consider whether the stipulation is invalid for want of power in the parties thereto to enter into

the same. At the time the stipulation was entered into an information in the nature of a bill in equity was pending against the drainage district wherein it was charged that Spring lake was a navigable body of water, and that appellees, in the prosecution of the drainage scheme, were threatening to destroy the right of the public to an easement in the waters of said lake for the purposes of navigation. If the appellants succeeded in their suit and the connections of Spring lake with the Illinois river were left open, the drainage of the swamp lands adjacent to said lake would be very expensive if not practically impossible. It would avail nothing to build a levee on the bank of the Illinois river if the canal and southern outlet of the lake remained open. The temporary injunction issued on the original bill, as long as it was in force, completely stopped the progress of the work of the drainage district. Neither party to the stipulation knew at that time what the ultimate result of the litigation would be. This was the situation when the stipulation was entered into. Is this stipulation void because it is *ultra vires* the drainage district?

A drainage district organized under the statutes of this State is a municipal corporation for a special and limited purpose and has such powers as are deemed essential for the accomplishment of its objects. (*Badger v. Inlet Drainage District*, 141 Ill. 540.) Section 16 of the Drainage law provides that after the county court enters its final order confirming the report of the commissioners, such district shall be deemed duly organized as a drainage district by the name mentioned in the petition, and said district is declared to be "a body politic and corporate, * * * with the right to sue and be sued, and to have perpetual succession," and that the commissioners appointed, and their successors in office, shall, from the entry of such order of confirmation, constitute the corporate authorities of such drainage district, and that said commissioners may exercise the functions conferred upon them by law. Section 17

authorizes the commissioners to proceed to obtain the right of way for all ditches, drains and levees or other work, and to agree, if possible, with the owners upon the amount of damages to be paid to such owners for the taking of the right of way and damages to lands not taken, and report the same to the court for its approval. Said section authorizes the commissioners, in the name of the district, to condemn, under the eminent domain laws of the State, any lands that may be necessary for right of way and which cannot be obtained by agreement. Section 17½, and sections to and including section 27, relate to the matter of assessment of benefits and damages and confer upon the commissioners powers in relation to those subjects. Section 28 is as follows: "Upon the organization of said drainage district, it shall in its corporate name, by its commissioners from thenceforth, have power to contract and be contracted with, sue and be sued, plead and be impleaded, and to do and perform, in the corporate name of said district, all such acts and things as may be necessary for the accomplishment of the purposes of this act."

Municipal corporations are formed by the State for purposes of local government and administration. Such corporations have extensive powers of local government, including the power of making local laws. There are numerous other local corporate bodies which are classed as municipal corporations, such as drainage districts, school districts, and the like, which are organized for a special purpose and are usually called *quasi* corporations. The chief difference between a municipal corporation, such as a city or village, and a *quasi* corporation, is, that the latter lacks the power of making local laws. (2 Page on Contracts, sec. 1008.) Both classes of corporations have an implied power to make contracts necessary to enable them to exercise the powers and perform the duties which are conferred upon them by law. (*French v. Paving Co.* 181 U. S. 324; *Agnew v. Brall*, 124 Ill. 312.) The power of

appellees to make any contract necessary to enable the district to perform its functions is expressly conferred by section 28 of the statute above quoted. Where the legislature, by statute, makes complete provision in regard to the power of the corporation to contract, and designates what purposes and in what manner such corporations may contract, such specific enumeration of purposes excludes any power, by implication, to contract. Under such a grant of power, in order to sustain a contract, it is necessary to find an express grant of power in the statute. (2 Page on Contracts, sec. 1011, and cases there cited.) Where there is a general grant of power by the legislature and the statute does not prescribe the method of making such contracts or enumerate the purposes for which such contracts may be made, the rule is that such corporation may make any contract that a natural person could make, if it is not expressly prohibited by the statute and is fairly entered into in furtherance of the general corporate purposes. The stipulation under consideration is not in violation of any statute of the State and its provisions are not contrary to any rule of public policy. This being true, the power of the drainage commissioners to enter into the contract depends upon whether the contract relates to a matter that is so entirely foreign to the purposes of the district that it must be held *ultra vires* and void.

Upon this question appellees rely with great confidence upon the case of *Badger v. Inlet Drainage District*, *supra*. In that case the drainage commissioners made a contract with Badger & Son by which they agreed to pay \$1700 for the removal of a dam across Inlet creek and to levy an assessment upon the lands in the drainage district to pay for the same, and issued seventeen orders, of \$100 each, to Badger & Son in payment for the removal of the dam. A levy was made to pay said orders but the collection of the tax was enjoined. An action of assumpsit was then brought upon the orders of the district. The circuit court

refused to hold that the orders were valid charges upon the lands of the district, and that ruling was brought into review in this court. This court affirmed the judgment, and held that the drainage commissioners had no power to contract for the removal of a dam not in any way connected with any approved system of drainage work of the district. The removal of this dam does not appear to have been mentioned in any petition filed, and the property owners of the district had been given no opportunity to be heard upon the question respecting the character of the improvement and its cost. This court, on page 548 of the opinion, speaking by Mr. Justice Scholfield, said: "It results that, in our opinion, when this drainage district was first organized there was no power in the commissioners to contract for the removal of the dam, etc., of appellants, and that before the commissioners could make any contract in that respect they must present to the court appointing them a report recommending the enlargement of the improvement for which they were previously appointed, accompanied by plans, profiles and an estimate of costs, including the removal of the dam, etc., and afford to the land owner of the district an opportunity to be heard upon the question of confirming such report." That case is clearly distinguishable from the case at bar. There the commissioners entered into the contract and proceeded to carry it out without affording the land owners any opportunity to be heard in reference to that improvement.

Appellees contend that at the time the stipulation in this case was entered into there had been no petition filed in the county court, no notice to the property owners and no order of the county court authorizing the improvement. The terms of the stipulation in the case at bar were assented to, reduced to writing and signed before the petition for the modification of the plans of the district was presented to and acted upon by the county court. The stipulation, however, on its face shows that it was not to be regarded

as effective for any purpose until the presentation of a petition and an order of the county court obtained authorizing the levy of a special assessment to pay for the improvement. In our opinion the validity of this stipulation is not to be tested as of the date when it was tentatively formulated and agreed to, but as of the date when it was filed in the circuit court and the chancery suit dismissed in pursuance thereof. If the drainage commissioners had power to enter into the stipulation on that date it is wholly immaterial whether it would have been enforceable prior to that time. The action of all parties concerned in causing the stipulation to be filed in court and procuring the dismissal of the law suit was, in effect, the entering into the stipulation on that day. There was a complete compliance in this case with the rule announced by this court in *Badger v. Inlet Drainage District*, *supra*, by filing a petition describing the proposed improvement, containing detailed plans and estimate of costs, notice to the land owners of the district and an opportunity to be heard, followed by an order of the county court approving the modification of the plans and ordering a special assessment to pay the costs thereof.

The only other cases cited and relied on by appellees in support of their contention upon this point are *Law v. People*, 87 Ill. 385, *City of Danville v. Danville Water Co.* 178 id. 299, and *City of Chicago v. Williams*, 182 id. 135. The *Williams* case was as follows: Williams sued the city of Chicago and recovered a judgment for stenographic and typewriting work done for the city under a contract with the chief of police and corporation counsel in a case wherein the chief of police was sued for false imprisonment, arising out of an arrest made in the course of his official duties. This court held that the city could not, under any circumstances, be held for damages for false imprisonment by reason of the wrongful conduct of the chief of police, and that said city had no interest in the litigation wherein

the stenographic services were rendered, and therefore the city was not liable for the fees of the stenographer. The right of recovery was not sustained, for the reason that the contract employing the stenographer by the chief of police did not concern any corporate purpose of the city. That case has no application to the situation presented by this record. The case of *City of Danville v. Danville Water Co.* arose out of the following facts: The city of Danville contracted with the Danville Water Company, by ordinance, for a supply of water at a given price per hydrant. The contract was for thirty years. Afterwards the city passed another ordinance reducing the price per hydrant that the city would be required to pay for its water supply. It did not appear that the second ordinance had been accepted by the water company. The water company continued to furnish water, and brought a suit, under the contract, for the amount due according to the rate fixed by the original ordinance. This court held that the legislature had the power to authorize cities to fix water rates, and that a contract fixing a uniform rate for thirty years was invalid, and could not deprive the city of its power, under the law, to fix rates from time to time, as in the judgment of the city council might seem reasonable and proper. That case has no application to the facts in the case at bar. There the contract purported to dispose of the legislative power of the city in regard to the fixing of water rates for thirty years. The appellee district has no legislative power, and if it had, the stipulation in question did not purport to dispose of or control such power. In *Law v. People* the power of a city to incur indebtedness in excess of the constitutional limit was involved, and it was held that the power to incur such excessive indebtedness did not exist. The power there sought to be exercised was in palpable violation of the constitution, which prohibits municipal corporations from incurring indebtedness to an amount, including existing indebtedness, in the aggregate exceeding five

per cent of the value of taxable property. A mere statement of the question decided in the *Law case* is sufficient to distinguish it from the case at bar.

The contracts sought to be enforced in *Law v. People, supra*, are apt illustrations of that class of municipal contracts which are wholly void because the municipality, under no conditions, could have the power to make them. Contracts entered into by a municipality which are prohibited by express provision of the law, or which under no circumstances could be legally entered into, are uniformly held to be *ultra vires* and void, and cannot be rendered valid, as against the municipality, by receipt of the consideration or other matter of estoppel, and cannot be rendered valid and binding by any act of the municipality ratifying the same. (1 Dillon on Mun. Corp.—5th ed.—sec. 323.) There is another class of municipal contracts which are usually classed as *ultra vires* which are only so in a limited or secondary sense. These are contracts which are within the general powers of the corporation but which are void because the power was irregularly exercised, or where some portion of an entire contract exceeds the corporate powers but other portions of the contract are within the corporate powers. This class of municipal contracts is well illustrated by the case of *City of East St. Louis v. East St. Louis Gas Light and Coke Co.* 98 Ill. 415. In that case the city of East St. Louis contracted for the lighting of its streets with the gas company, at a fixed price per light, for the term of thirty years. A suit was brought by the gas company to recover the monthly installments that were past due under the contract. The city defended on the ground that the contract was *ultra vires* and that no suit could be maintained thereon. This court held that the lighting of the streets was a purpose clearly within the corporate powers of the city; that the contract had no element of illegality in it and that it was only illegal in respect to the term of its duration; that the corporation having re-

ceived the benefits under a contract which was merely *ultra vires*, it was bound to pay for the benefits received, and that the rule applicable to municipal corporations in this regard was the same as in the case of a private corporation. Many cases are to be found applying this rule, and the principle is now firmly established that the doctrine of *ultra vires* is not applied (except in cases where the contract is prohibited by some rule of law) where its enforcement would enable the municipality to obtain an unconscionable advantage of the other party to the contract, and that municipal corporations, as well as private corporations and natural persons, are bound by the principles of common honesty and fair dealing. Contracts made by a municipality which are merely *ultra vires* in a modified or secondary sense may be ratified and any defect in the manner of exercising the power thereby cured, and the municipality may likewise estop itself by acts *in pais* from setting up the defense of *ultra vires*. (2 Dillon on Mun. Corp.—5th ed.—sec. 797.)

The obligation imposed upon the drainage district by the stipulation in question was to construct a levee across Spring lake and place a lock therein to permit boats to pass through, and to maintain and operate the lock without charge, and to dredge out the channel below the dam and keep the same in repair. It can hardly be the subject of serious controversy that a drainage district has the power, under the statute, to build dikes and levees, and also the power to dredge out and deepen channels of any natural water-courses, that may be necessary to the proper drainage of the district. The particular subject matter, therefore, of this stipulation was not foreign to the purposes for which the district was organized. On the contrary, it is strictly within the purposes of its organization. It is true, the evidence shows that there was another method of draining the territory within this district, but that method contemplated the drainage of Spring lake as well as the

other territory within the boundaries of the district. The right to interfere with the waters of Spring lake was involved in the pending litigation. If the State succeeded, the district would be driven to adopt the plan provided for in the stipulation or some other similar plan, or abandon the drainage district altogether. Leaving out of view for the moment the existence of the stipulation, suppose the drainage commissioners had filed a petition in the county court setting up that Spring lake was a navigable body of water and that it was desirable and necessary to the proper drainage of the district to construct an improvement such as is provided for in the stipulation; suppose that all parties having a right to be heard upon the question of the character and cost of the improvement had been properly notified and brought into court, and upon a full hearing the county court had ordered the district to proceed with the improvement and all persons in interest had acquiesced in such judgment of the county court; could there be any doubt that the district would be liable on a contract made with a third party for the construction of such improvement? So far as the drainage district is concerned, we think that the validity of this stipulation should be tested upon the assumption that Spring lake was, in fact, a navigable body of water. If this be assumed, we see no escape from the conclusion that the improvement was clearly within the powers of the drainage district, and that the stipulation, after the county court had ordered the improvement upon full notice to all the land owners, was, when filed in the circuit court, a valid, binding obligation. It may be true that some portion of the work contemplated by the stipulation was intended to preserve the public easement that was claimed to exist in Spring lake and was not strictly necessary for the purpose of draining the lands of the district, but this is incidental to the main purposes of the stipulation. The drainage district was involved in litigation which in certain contingencies might defeat the pur-

poses of the organization. The law is well settled that municipal corporations have power to compromise and settle pending litigation. This power is necessarily implied from the power to sue and be sued. (2 Dillon on Mun. Corp.—5th ed.—sec. 821.) In *City of Shawneetown v. Baker*, 85 Ill. 563, this court held that a municipal corporation has power to submit to arbitration unsettled claims with the same liability to perform the award as would rest upon a natural person, such power being properly exercised by ordinance or resolution of the city council. In *Agnew v. Brall*, *supra*, it was held that a city could legally agree to accept one-half of a judgment rendered in its favor and release the claim, where the right of appeal existed and the defendant was threatening to appeal unless such compromise was effected, and that such agreement, when complied with by the defendant, was binding upon the city. While the drainage commissioners constitute the corporate authorities of the district and are by the statute clothed with the power to exercise the corporate functions of the municipality, the real parties in interest are the land owners whose property is liable to assessment to meet the corporate liability. The statute contemplates that the property owners in the district shall have notice and a right to be heard in the county court before their property can be legally assessed to pay for local improvements. Where a proper petition has been filed, notice given to the land owners, opportunity afforded for a hearing, and the county court, having complete jurisdiction of the subject matter and of the parties in interest, confirms the plans for the improvement and orders an assessment made therefor, the judgment of the county court is conclusive, in all collateral proceedings, of the power of the district to make the same. If it be said that the land owners of the district ought to have the right to question the power of the district to levy an assessment for the particular improvement here involved, it may be replied that they had such opportunity

on the hearing of the petition in the county court, and having failed to raise such question there, they are not deprived of any right by holding that they shall not be permitted to raise such question in any collateral proceeding.

Appellees contend that the stipulation was one that the Attorney General had no power to enter into. Upon this branch of the case but little need be said. The Attorney General, under the law, is the sole representative of the people and the canal commissioners and has the power to file informations such as the one filed against appellees, and has power, both under the common law and under the statute, to make any disposition of such causes that he deems best to the interest of the State. (*Hunt v. Chicago Horse and Dummy Railway Co.* 121 Ill. 638; *Canal Comrs. v. Village of East Peoria*, 179 id. 214.) No serious question can be raised in respect to the power of the Attorney General to dismiss a suit brought by him, either with or without any stipulation, upon behalf of the opposite party.

But it is said by appellees that the consent of the canal commissioners and the Attorney General to the closing of the artificial connection with Spring lake at the north end was not within their power. If it be assumed that the public had an easement in this canal, (which is disputed by appellees because, it is said, it was constructed without obtaining the right of way therefor,) still we have no doubt of the power of the Attorney General and the canal commissioners to consent to its being closed in consideration that another and more valuable means of ingress to and egress from Spring lake was provided before the closing of the canal. This is not a case of public officials contracting away valuable public rights, but it is simply the substitution, by consent, for one way of getting in and out of the lake of another which is concededly more advantageous and valuable to the public. All of the rights of the public in Spring lake are preserved by the stipulation.

Our conclusion is that the stipulation entered into between the parties to the original chancery suit is a valid, binding agreement upon all parties thereto, and that the circuit court erred in holding that such stipulation was void.

It results from what has been said that the decree below must be reversed and the cause remanded, with directions to the circuit court to enter a decree perpetually enjoining the appellees from proceeding in violation of the stipulation and from interfering in any way with Spring lake except in accordance with the terms of said stipulation.

Reversed and remanded, with directions.

JULIA LANGGUTH, Defendant in Error, vs. THE VILLAGE OF GLENCOE, Plaintiff in Error.

Opinion filed February 23, 1912—Rehearing denied April 3, 1912.

1. LIMITATIONS—*when amended declaration does not allege a new cause of action.* Where the date of the injury sustained by the plaintiff is laid under a *videlicet* as on June 14, 1906, an amendment changing such date to 1907, to correspond with the fact, does not amount to the statement of a new cause of action.

2. MUNICIPAL CORPORATIONS—*notice of a personal injury must be filed before suit is brought.* In the case of a personal injury alleged to be due to the negligence of a municipal corporation, the filing of the notice required by the statute is an essential element of the plaintiff's case which must be alleged and proved, and it is therefore necessary that such notice be filed before suit is begun.

FARMER, J., dissenting.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. BEN M. SMITH, Judge, presiding.

MORTON T. CULVER, (ALBERT O. OLSON, Village Attorney, of counsel,) for plaintiff in error.

MYER S. EMRICH, for defendant in error.

Mr. JUSTICE HAND delivered the opinion of the court:

This was an action on the case commenced by Julia Langguth in the superior court of Cook county, against the village of Glencoe, to recover damages for an injury to her person caused by a fall upon one of the sidewalks of said village which it was alleged the village negligently suffered and permitted to be out of repair. The general issue was filed, and a trial resulted in a verdict and judgment in favor of the plaintiff for the sum of \$1500, which was affirmed by the Appellate Court for the First District, and the record has been brought to this court for further review by writ of *certiorari*.

The accident occurred on June 14, 1907; action was commenced by filing *præcipe* on August 13, 1907; summons was served November 2, 1907; declaration was filed December 27, 1907, and it was averred therein that the accident occurred on June 14, 1906, and the notices required by paragraphs 6 and 7 of chapter 70 (Hurd's Stat. 1909, p. 1247,) were filed in the office of the village attorney December 10, 1907, and in the office of the village clerk December 13, 1907. The trial commenced October 1, 1908, when it was discovered that the date of the accident was averred to have occurred on June 14, 1906, instead of on June 14, 1907. On motion of the plaintiff the declaration was amended to correspond with the facts, when the defendant filed a plea of the Statute of Limitations, averring the cause of action had occurred more than one year prior to the filing of the amended declaration, to which plea the court sustained a demurrer. The action of the court in sustaining the demurrer to the plea of the Statute of Limitations is assigned as error. The date, June 14, 1906, was laid under a *videlicet*. We do not think the amended declaration stated a new cause of action. The court, therefore, did not err in sustaining the demurrer to the plea setting up the Statute of Limitations.

It appears from the record that the notices required by the statute to be filed in the offices of the village attorney and the village clerk were filed after the action was commenced, and it is insisted by the appellant that when that fact was made to appear the court erred in not dismissing the cause of action. The statute referred to reads as follows:

"Sec. 1. No suit or action at law shall be brought or commenced in any court within this State for damages against any incorporated city, village or town by any person for an injury to his person unless such suit or action be commenced within one year from the time such injury was received or the cause of action accrued.

"Sec. 2. Any person who is about to bring any action or suit at law in any court against any incorporated city, village or town for damages on account of any personal injury shall, within six months from the date of injury, or when the cause of action accrued, either by himself, agent or attorney, file in the office of the city attorney (if there is a city attorney, and also in the office of the city clerk) a statement in writing, signed by such person, his agent or attorney, giving the name of the person to whom such cause of action has accrued, the name and residence of person injured, the date and about the hour of the accident, the place or location where such accident occurred and the name and address of the attending physician (if any.)

"Sec. 3. If the notice provided for by section 2 of this act shall not be filed as provided in said section 2, then any such suit brought against any such city shall be dismissed and the person to whom any such cause of action accrued for any personal injury shall be forever barred from further suing."

We think the intent of the legislature as expressed in the statute above referred to, clearly was that the notices referred to therein should be filed before suit was commenced. Section 2 states any person who is about to bring

an action or suit at law in any court against any incorporated city, village or town for damages on account of any personal injury shall file notices, etc., clearly indicating that before suit was brought the notices should be filed, and such, we think, is the holding of this court in the cases wherever the sections of said statute have been before this court. In *Erford v. City of Peoria*, 229 Ill. 546, the notices were not filed, and this court said: "Statutes of this character are mandatory and the giving of the notice is a condition precedent to the right to bring such suit, and the giving of the notice must be averred and proved by the plaintiff to avoid a dismissal of his suit." In *Walters v. City of Ottawa*, 240 Ill. 259, the notices had been filed but the declaration failed to aver that fact. After one year the plaintiff attempted to cure the defect by an amendment averring notice. The trial court permitted the amendment and sustained a demurrer to a plea of the Statute of Limitations. This court held, however, that the original declaration stated no cause of action, and that the defect could not be cured by amendment after the Statute of Limitations had run. The court, on page 262 of the opinion, said: "Did the original declaration state a cause of action? It stated facts which would have enabled the plaintiff to maintain an action before the passage of the statute referred to. But this legislation has added a new element to those required to make a city liable to an action of this kind. It is not enough now, as it formerly was, that the city has been negligent in the maintenance of its sidewalk, and the plaintiff, while exercising due care, has been injured in consequence of such negligence. The giving of the notices required by the statute has been made a condition precedent to the city's liability and constitutes an essential element of the plaintiff's cause of action." And in *Ouimette v. City of Chicago*, 242 Ill. 501, the day of the month when the accident occurred was stated in the notices as November 10 while the evidence showed the accident

occurred on October 10, and it was held there could be no recovery.

If the notices required by statute constitute one of the elements of the plaintiff's cause of action which must be averred and proved before a recovery can be had, that element must exist at the time the action is brought, as the plaintiff clearly cannot recover upon a cause of action one element of which had no existence when he brought suit but which has been brought into existence since the suit was commenced by the action of the plaintiff. We think, therefore, it is plain that as the notices required by the statute had not been filed at the time this suit was commenced there can be no recovery in this case.

The judgments of the superior and Appellate Courts will be reversed and the cause remanded.

Reversed and remanded.

Mr. JUSTICE FARMER, dissenting:

In my judgment neither the letter nor the spirit of the statute considered in this case warrants the construction given it by the court. Assuming it to be competent for the legislature to make giving notice a condition precedent to the right to begin an action, it has not done so by the statute under consideration. The act requires notice to be given within six months from the date of the injury and suit to be commenced within one year. The obvious purpose of the notice of the injury and claim for damages is to enable the municipality to investigate the validity and good faith of the claim before being called upon to defend against it upon the trial, and section 3 provides that unless it is given within the time required the suit shall be dismissed and the action be forever barred. This court has held the giving of the notice must be averred in the declaration, but whether it is necessary that the notice be given before filing a *præcipe* and suing out a summons has not been heretofore presented for decision. This question was

not involved in *Erford v. City of Peoria*, 229 Ill. 546, or in *Walters v. City of Ottawa*, 240 id. 259. In the *Erford case* no notice was ever given the city. In the *Walters case* it was held filing the statement or notice required by section 2 is essential to the right to maintain the suit; that a declaration which failed to aver compliance with the statute did not state a cause of action, and that a plea of the Statute of Limitations to an amended declaration filed more than one year after the injury occurred was a good plea. I was not in harmony with that decision, but conceding it was correct it should not control the decision in this case, as the question now before us was not then involved. The only justification for a decision productive of the unjust consequences that result from this decision would be the imperative language of the statute. I find no language in the statute that in my judgment warrants the construction given it. The principles of justice do not warrant it, for no possible prejudice or injury could have resulted to the city from filing the *præcipe* before the claim and notice were filed. As the plaintiff recovered a judgment in the trial court, which was affirmed by the Appellate Court, it is a fair presumption that she had a meritorious cause of action. This, however, is lost to her, not because she failed to give notice within the time required or failed to aver giving the notice in her declaration filed within one year, but because she filed a *præcipe* and had summons issued before filing the claim and notice. Every benefit that could accrue to defendant from being notified of the claim within six months was just as available to it as would have been the case if the *præcipe* had not been filed until after the notice was given, and it seems to me the harsh and strict construction given the statute was not required by the language of the act.

DAVID A. MILLIGAN, Appellant, vs. JESSE MILLER, JR.,
et al. Appellees.

Opinion filed February 23, 1912—Rehearing denied April 3, 1912.

1. *ESTOPPEL*—*fraudulent intention not essential to doctrine of estoppel.* A fraudulent intention is not essential to the doctrine of estoppel, and it is enough if a fraudulent effect would follow if a party were allowed to set up a claim inconsistent with his former declarations and conduct.

2. *SAME*—*an estoppel may arise from silence as well as from words.* Estoppel may arise from silence as well as words where there is a duty to speak and the party upon whom the duty rests has an opportunity to speak, but, knowing the facts, keeps silent.

3. *SAME*—*party seeing another about to infringe his right should assert it.* It is the duty of a person having a right, to assert the same when he sees another about to commit an act infringing such right, and he cannot, by his silence, induce or encourage the commission of the act and then be heard to complain.

4. *SAME*—*when owner of land is estopped to complain that he was not made party to road proceeding.* One who owns land under an unrecorded deed from his father is estopped to complain that he was not made a party to a proceeding to open a road through the land, where he knew the commissioners were deceived by the records in making his father a party but made no disclosure of the facts, though having frequent opportunity to do so.

5. *NOTICE*—*when party in possession by tenant must assert his title.* Where one owning land in possession of a tenant conveys the land to his son by a deed which is not put on record, and the land remains in possession of the tenant, the father continuing to act as landlord and agent, there is no such outward change of ownership as relieves the son of the duty of asserting his ownership when he sees that highway commissioners, in proceeding to open a road, have been deceived by the records into the belief that the ownership of the land is in the father.

APPEAL from the Circuit Court of Shelby county; the
Hon. THOMAS M. JETT, Judge, presiding.

WILLIAM H. RAGAN, and GEORGE B. RHODS, for ap-
pellant.

RICHARDSON & WHITAKER, for appellees.

Per CURIAM: The appellant sued the appellees in trespass and appealed from a judgment in their favor to the Appellate Court, which transferred the cause here because a freehold was involved.

The appellees are commissioners of highways of four townships in Shelby county which meet at one corner. A petition was presented to them in September, 1905, for the laying out of a highway on the dividing line between two of the townships on the north and two on the south, and such proceedings were had that upon an appeal to three supervisors a final order was made for the laying out of the highway and was filed in the several township clerks' offices. Proceedings were taken for the assessment of damages, the amounts assessed were tendered, notice to remove fences was served, and on June 25, 1907, the fence on the south side of the south-east forty acres of Shelbyville township was removed by the appellees. The suit was for damages caused by the removal of that fence. The defendants justified as commissioners under the order establishing the road.

David A. Milligan, the appellant, is a lawyer, living at Shelbyville. David Y. Milligan, his father, is a farmer, who owned the forty acres mentioned and lived near. In 1902 he conveyed that forty to his son, reserving a life estate. The deed was not put on record until after this suit was begun and the father and son succeeded in deceiving the commissioners as to the title, so that no notice was ever served upon the appellant or damages allowed to him or attempt made to settle with him but his father was throughout the proceedings treated as the owner of the land. Soon after this deed was made the father gave the plaintiff the possession of the land, and says that he verbally released the life estate reserved in the deed. This intended release was ineffectual, and the father continued to be the owner of a life estate in the premises. He was therefore properly made a party to the proceeding to lay

out the road and assess the damages. The appellant, who owned the remainder, was not named in the petition for the road or any of the proceedings to lay it out and assess damages to the owners, as an owner of land. For the purpose of this case we think it must be held that there was no lack of jurisdiction in the commissioners and supervisors, and no such irregularity as would authorize a recovery by appellant upon the ground that the proceeding to lay out the road was invalid in any other respect than that he was not made a party and his damages assessed. His right to recover on that ground is denied by appellees, because, it is alleged, he is estopped by his own conduct, together with that of his father, who, it is claimed, represented appellant in looking after the land. The land has been, during all the time it was owned by appellant and his father, in the possession of tenants. Appellant and his father testified the father turned his possession over to appellant in the spring of 1903. This change of possession was not manifested by any changed appearances, as the land continued in the occupancy of tenants, but after that time it is claimed they were the tenants of appellant instead of his father, and the leases were made by appellant and rent accounted for to him.

For the purpose of ascertaining who were owners of the lands over which the proposed road was to be laid out and making them parties to the proceedings the records in the recorder's office were examined. The title of record was in David Y. Milligan, appellant's father. David Y. Milligan testified he had acted as landlord, under appellant's directions, from the time the deed was made to the time he testified on the trial; that sometimes appellant paid him for his services and sometimes rendered services for the witness which offset services the witness rendered, as agent for appellant, in looking after the land. Several of the commissioners of highways testified that when they met to examine the route of the proposed road David Y. Milli-

gan was present; that he spoke of the land as his, and claimed the proposed road, if laid out, would damage him \$1200.

When the supervisors summoned to hear the appeal had decided to grant the road they called on David Y. Milligan to talk with him about the damages on account of taking a part of the forty acres for the road and endeavored to agree with him upon the amount. They told him they had agreed with the other land owners who were damaged and had come to try to agree with him. Milligan declined to do business with them and asked them to show their credentials. One of them showed him a copy of the summons that had been served upon them, and he then wanted them to prove they were the men they represented themselves to be. The supervisors told him if they could not agree on the damages they would have to call a jury to assess the amount. Milligan replied, "Squire Johnson told me Saturday that you fellows were coming to give me \$40 an acre for my land," and said he did not want to do any business with the supervisors. Appellant was not present on any of these occasions and had no talk with the commissioners about the road prior to the final order establishing it, and the assessment of damages to his father, by jury, for taking a part of the land which appellant owned in fee, subject to a life estate in his father.

On the 17th of April, 1907, a notice, signed by all but one of the commissioners of highways of the four townships, was served upon David Y. Milligan to remove his fences from the road as laid out by order of the three supervisors. Said notice also informed Milligan that \$400 damages assessed in his favor was in the hands of justice of the peace W. E. Lowe. On the same day that notice was served, as we understand it,—at all events before the alleged trespasses were committed,—several of the appellees called on the appellant at his office in Shelbyville and tendered him the amount of the damages that had been as-

sessed to his father. The tender was made to him as attorney and agent for his father. He admitted he was such agent and attorney for his father but refused to accept the money, and stated he had no authority to do so. He gave no other reason for refusing to accept the money and at no time stated or disclosed to appellees that he owned the land, and made no claim to them that the damages had not been assessed to the proper party or that his father was not the sole owner of the land. On June 25, 1907, the fence not having been removed, appellees entered on the land, tore down and removed the fence. This suit was brought the following day.

It is a justifiable inference from the evidence that appellant and his father were in collusion for the purpose of concealing from appellees appellant's interest in the land. They knew appellant's title was based upon an unrecorded deed, and must have known David Y. Milligan was named in the road proceedings as owner of the land because he appeared to be so from the records. David Y. Milligan acted as agent or landlord of it for appellant up to the time of the trial. He was hostile to laying out the road, spoke of the land as his and claimed he would be damaged in a large sum. If he had at any time informed the commissioners or the supervisors of the true state of the title, it is not to be presumed they would have gone ahead to force the laying out and opening the road without regard to the rights of appellant. No one testified that appellant knew of the proceedings to lay out the road while they were being carried on, nor did anyone testify that he did not know of the proceedings. It would seem incredible that he did not know of them. In fact, we think it reasonably certain from all the evidence that he must have known of them. He lived in Shelbyville, in the same township wherein the land was located and but a short distance from it. Public notice was given of the meeting of the commissioners to hear reasons for and against laying out the road.

David Y. Milligan was present at that meeting. When three supervisors were summoned to hear the appeal and failed to agree with David Y. Milligan on the damages they caused a jury to be summoned, and a hearing was had to determine how much damage would be caused by taking the land proposed. David Y. Milligan was summoned, as the owner of the land, to appear at the hearing. It would seem impossible that all these proceedings should take place and the appellant not know what was going on. When the money was tendered him for his father he did not pretend ignorance of the proceedings but contented himself with saying he had no authority to accept it. It would have been an easy matter, and under the facts disclosed by this record we hold it was their duty, for appellant and his father to inform the commissioners of the state of the title. When they went to appellant to tender him, as attorney and agent for his father, the damages assessed, the trespass complained of had not been committed, and if he had then told them his father owned only a life estate in the land and that he was the owner, by an unrecorded deed, of the remainder in fee, and they had then gone ahead and committed the acts complained of, his position might have been entirely different. He knew the true state of the title and he knew the commissioners did not know it. He knew they were ignorant of his unrecorded deed,—that they believed the land to be his father's and proposed to enter upon it and open the road. By his silence when he should have spoken the commissioners were led to do the acts he now complains of and for which he seeks to mulct them in damages. We think he is estopped upon sound legal principles and principles of right and justice. It is true, appellant originally did nothing to induce the commissioners to omit making him a party to the road proceeding, and if his title had been of record he might have owed them no duty to inform them of his interest, but he knew the title of record was in his father and must

have known the commissioners were misled by that fact. Whether so intended or not, appellant's silence when he should have spoken operated as a fraud upon appellees. A fraudulent intention is not essential to the doctrine of estoppel. It is enough if a fraudulent effect would follow allowing a party to set up a claim inconsistent with his former declarations or conduct. Estoppel may arise from silence as well as words where there is a duty to speak and the party on whom the duty rests has an opportunity to speak, and, knowing the circumstances, keeps silent. (*Thompson v. Simpson*, [N. Y.] 28 N. E. Rep. 627.) It is the duty of a person having a right, and seeing another about to commit an act infringing upon it, to assert his right. He cannot by his silence induce or encourage the commission of the act and then be heard to complain. (11 Am. & Eng. Ency. of Law,—2d ed.—427-429; 16 Cyc. 771, 796.) The general rule is, that possession under an unrecorded deed is notice to all the world, but under the facts and circumstances of this case appellant was not relieved of the duty to speak because he was in possession of the land by tenant. There is nothing in the evidence that would indicate to the public that the party in possession was not the tenant of David Y. Milligan but was the tenant of appellant. The land appears to have been in possession of a tenant all the time it was owned by David Y. Milligan. It so continued to be occupied by a tenant after the conveyance to appellant, and David Y. Milligan continued, he says, to act as landlord and agent for it. So far as the public could see, there was no change after the conveyance to appellant.

We have considered the complaints made of the rulings of the court in the admission of evidence and giving and refusing instructions. In the view we take of this case there was no error in the admission of evidence. While we cannot say the court's rulings in giving and refusing instructions are entirely free from error, they are free from

errors so prejudicial to appellant as to justify a reversal of the judgment.

A consideration of the whole record satisfies us the judgment was right, and it is affirmed.

Judgment affirmed.

THE VILLAGE OF GLENCOE, Appellee, vs. GERTRUDE UTHE
et al. Appellants.

Opinion filed February 23, 1912—Rehearing denied April 3, 1912.

1. SPECIAL ASSESSMENTS—*when finding that ordinance was not unreasonable will be upheld.* A finding that a sidewalk ordinance is not unreasonable in requiring cement walks instead of cinder walks will be upheld on appeal, where, though the evidence is conflicting, its weight is not clearly contrary to the finding.

2. SAME—a sidewalk assessment is spread on basis of benefits. Under the Local Improvement act an assessment for the construction of sidewalks should be spread according to benefits, without regard to the number of feet fronting on the proposed improvement; and the fact that inside lots may thus be compelled to bear part of the burden of constructing the walks along corner lots is not a valid objection, if the inside lots are not assessed more than they are benefited nor more than their proportionate share of the cost of the improvement.

3. SAME—lots benefited may be assessed though previously assessed for other walks. The fact that certain lots in the district where a system of sidewalks is to be constructed already have sidewalks in front of them for which they have been assessed and which are not to be replaced by the proposed improvement, does not preclude their being assessed if they, in fact, receive additional benefits from the construction of other sidewalks in the district.

4. SAME—the fact that owners cannot construct walks does not preclude assessment of lots. The fact that lot owners cannot relieve their lots from the assessment by constructing the walks, as permitted by the statute, because the walks in front of their property are already constructed, does not relieve their lots from liability to an assessment for the benefits they will receive from the construction of the other sidewalks in the locality.

5. SAME—public hearing is necessary if sidewalk ordinance requires construction of berme. A berme of earth is not a part of a

cement sidewalk, and if the ordinance requires the construction of a berme as well as the sidewalk the improvement is not one for sidewalks, only, but is one which requires a public hearing.

6. *SAME—benefits cannot be assessed for part of improvement not described in ordinance.* If the ordinance for the construction of sidewalks around a certain addition fails to provide for the intersections at the corners of such addition no assessment therefor can be made, even though made as public benefits and though the estimate for the total number of square feet of sidewalk to be constructed included such intersections, which were also treated as part of the improvement in spreading the assessment.

APPEAL from the County Court of Cook county; the Hon. JOHN E. OWENS, Judge, presiding.

DANIEL S. WENTWORTH, for appellants.

GORDON A. RAMSEY, (MORTON T. CULVER, and ALBERT O. OLSON, Village Attorney, of counsel,) for appellee.

Mr. JUSTICE FARMER delivered the opinion of the court:

The county court of Cook county entered a judgment at the June term, 1911, overruling the legal objections to and confirming a special assessment against the property of appellants for the construction of a system of sidewalks in Uthe's addition to the village of Glencoe. The proposed improvement was for the construction of a cement sidewalk five feet wide around blocks 1, 2, 3, 4, 5 and 6, except on the north side of blocks 3 and 4, along which a sidewalk had been previously constructed. The proceedings were under the Local Improvement act, the costs to be paid by special assessment upon the property benefited. Appellants have prosecuted an appeal to this court.

It is first contended that the ordinance is unreasonable in providing for a cement sidewalk when a cinder sidewalk at one-fourth the cost would bring the same benefits. Uthe's addition is used for residence purposes, only. It consists of six blocks, lying south-west of the Chicago and

Northwestern railroad. It is not thickly populated, there being but nineteen houses on the six blocks, the most of them being small dwelling houses costing about \$500. According to the testimony lots sell at \$300, and the market value of an entire block is \$4500. L. H. Lloyd, a witness for appellants, testified that the lots along which the walk was to be constructed in front, only, would be benefited from \$15 to \$20, or about the cost of a cinder walk, and that corner lots would be benefited about \$50. He further testified that block 1 is all owned by one person and that its market value would not be increased by the improvement. Other witnesses for appellants testified that the lots along which the walk had been already constructed would not be benefited. Witnesses for appellee fixed the amount of benefits at substantially the amount assessed. All the witnesses agree that the corner lots would be benefited more than the inside lots, most of them fixing the benefit at two or two and one-half times the benefit received by the inside lots. As is usually the case in proceedings of this kind, the testimony is conflicting. Opposed to the testimony of L. H. Lloyd that the lots would not be benefited more than \$15 or \$20 is the testimony of three witnesses for appellee that the lots would be benefited the amount assessed, one placing the benefits at much more than the assessment. In the face of this testimony we cannot say that the court erred in overruling the objections that the ordinance was unreasonable.

Appellants contend that the cost of making the improvement was improperly and unequally distributed. According to location with reference to the proposed improvement and the amount assessed, the lots may be divided into four classes: (1) Inside lots fronting on the proposed sidewalk to have the walk built along the front, only, and which were each assessed \$64.30; (2) corner lots to have the walk built along one side, only, and which were each assessed \$81.10; (3) corner lots to have the walk built

along one side and front, and which were each assessed \$125.27; and (4) lots not abutting on the proposed improvement, along which walks had been previously constructed, and which were each assessed \$16.60.

The assessment was spread on the theory that all the property benefited by the improvement should be assessed in proportion to the benefits received, in the same manner as street pavements and other improvements, without regard to frontage or whether or not walks had been previously constructed. It is contended by appellants that the assessment to build a sidewalk is not made on the same theory as in street paving; that the effect of the assessment as spread is to assess the inside lots for a portion of the cost of constructing the walks along the corner lots and for the intersections; also that lots not abutting on the proposed improvement should not have been assessed.

The only difference in the application of the Local Improvement act to the construction of a sidewalk and to a street pavement or other improvement is in the provision contained in section 34 of the said act which provides: "Whenever any ordinance shall provide only for the building or renewing of any sidewalk, the owner of any lot or piece of land fronting on such sidewalk shall be allowed forty (40) days after the time at which said ordinance shall take effect in which to build or renew such sidewalk opposite to his land, and thereby relieve the same from assessment." This provision does not change the method of spreading the assessment provided in section 39 of said act, in which it is made the duty of the officer who spreads the assessment to estimate what proportion of the total cost will be of benefit to the public and the property and to apportion it accordingly, no property to be assessed a greater amount than it is benefited. In a special assessment proceeding the assessment must be made in proportion to the benefits received, without regard to the number of feet fronting on the improvement. This applies to the con-

struction of a sidewalk as well as to street paving and other improvements. The effect of spreading the assessment in this manner may be to compel the inside lots to bear a part of the burden of building the walk along the corner lots, but that cannot be urged as an objection to the assessment on the inside lots so long as they are not assessed more than they are benefited or more than their just proportion of benefits. The principle applied in *Village of Downers Grove v. Findlay*, 237 Ill. 368, that corner lots must be assessed in proportion to the benefits received, the same as inside lots, is applicable to this case. The testimony shows that the benefits were properly apportioned between the corner lots and inside lots in this case.

Along the front of lots 2 to 11, in blocks 3 and 4, a sidewalk was constructed previous to the commencement of this proceeding, and it is contended by appellants that since the owners of those lots cannot construct the sidewalks and relieve the lots from assessment they should not be assessed. The provision in section 34 applies only to lots "fronting on such sidewalk," and as those lots do not front on the sidewalk proposed to be constructed it has no application to them. Although those lots may have been assessed at the time the sidewalk along them was constructed, that is no objection to an assessment for this improvement if they are benefited by it. Section 54 of the Local Improvement act provides: "It shall be no objection to the legality of any local improvement that a similar one shall have been previously made in the same locality, if the ordinance therefor be recommended by the board of local improvements, as above provided." These lots were assessed at the time the walk was constructed, but if additional benefits are received by the connection of other walks to those already constructed an assessment may be made for those benefits.

The ordinance provides that the sidewalk should be five feet wide and the inside edge parallel with and two feet

from the street or property line. A sub-foundation was required by cutting down or filling up the natural surface, so that when the sidewalk was finished its surface along the center line thereof should conform to the grade established. Upon the sub-foundation was to be placed a layer of cinders five and one-half inches deep along the center line and six and one-half inches deep at the edges, after having been thoroughly flooded with water and compacted. Upon the cinders the cement walk was to be built from three and one-half to four and one-half inches thick. "Wherever filling is necessary to bring such sub-foundation to sub-grade, it shall be done with earth or other material equally as good for filling purposes, free from animal and vegetable matter, and in such a manner as to leave a berme of twelve (12) inches on each side of and flush with the top of the cinder foundation hereinafter provided for, and shall slope to the surface of the ground at the rate of one and one-half ($1\frac{1}{2}$) feet horizontal to one (1) foot vertical, and said filling shall be thoroughly compacted until solid and unyielding: *Provided, however*, that the slope of the side of such filling nearest to the property or street line, where necessary, shall be increased sufficiently and such side made as near vertical as shall be necessary to keep such filling entirely within the street." Appellants contend the berme or embankment on each side of the walk was no part of the walk, and that as no public hearing was had it was erroneous to confirm the assessment. The assessment was made and confirmed upon the theory that the whole of the improvement was a sidewalk, and if it was, no public hearing was required by the statute. Frank A. Windes, a civil engineer of fifteen years' experience, testified he was familiar with the proposed improvement, its location and the nature of the soil; that the berme was for a retaining wall to hold the cinder foundation in place and prevent its disintegrating, sloughing off and leaving no filling under the edges of the walk. The berme was to be made of the earth removed

from excavations, and was adopted because it was much less expensive than a plank or concrete curb retaining wall.

In *People v. Klehm*, 238 Ill. 89, and *City of Chicago v. Bassett*, 238 id. 412, the question whether an embankment on the sides was part of a sidewalk was presented. In the *Klehm* case the walk was to be constructed of cinders and the proceeding was under the Sidewalk act of 1875. There was to be a wooden curb on each side and the cinder walk was to be constructed between the two curbs. The curbing was to be back-filled with earth in such manner as to leave a berme six inches wide on each side of and flush with the top of the sidewalk, with a slope to the natural surface of the ground at the ratio of one foot horizontal to one foot vertical. The court held "the berme and sloping embankment are not a part of the sidewalk." In the *Bassett* case the ordinance provided for building a cinder sidewalk between wooden curbs, with a berme on each side of the walk flush with the surface of the walk and six inches in width at the top. The city insisted that the improvement, as a whole, was a sidewalk. The court said: "This improvement, as a whole, is not within the language of the proviso upon which the city relies." The court held that the case could not be distinguished from the *Klehm* case, on the ground that in that case the sidewalk was to be built under the Sidewalk act of 1875 and in the *Bassett* case the proceeding was under the Local Improvement act. "That which is no part of a sidewalk within the meaning of the Sidewalk act is no part of a sidewalk within the meaning of the proviso here relied upon."

In *People v. Patton*, 223 Ill. 379, the proceeding was for the construction of a cement sidewalk under the act of 1875. The ordinance provided for banking earth against the walk level with the top of the walk and extending two feet from its sides, sloping downward at the ratio of one-half foot horizontal to one foot vertical to the natural surface of the ground, the filling to be smoothed off with rakes

to a smooth surface. It was held the embankments were no part of the sidewalk. If the case at bar could be distinguished from the *Klehm case* and the *Bassett case*, as contended by counsel for appellee, it cannot be distinguished from the *Patton case*. In that case, as in the case before us, there were no wooden curbs or other retaining walls than the earth embankment. If the embankment in the *Patton case* was no part of the sidewalk the embankment in this case would not be part of the sidewalk. It was erroneous, therefore, to confirm the assessment without having had a public hearing.

It is further contended that there is a variance between the ordinance and the estimate of cost. The ordinance under which the improvement was made failed to provide for the intersections, five feet square, at the north-east, north-west, south-east and south-west corners of Uthe's addition. The description of the improvement in the estimate of cost is the same as in the ordinance, but in estimating the total number of square feet of walk to be laid these intersections were included and were also considered as part of the improvement in spreading the assessment. An assessment for benefits to the public was made but the amount assessed is not shown by the record in this case. The officer who spread the assessment testified that the assessment for public benefits was made to cover the cost of these intersections. The assessment for public benefits is made on the theory that the public is benefited by the entire improvement, and it cannot be said that the assessment for public benefits in this case was for the purpose of constructing the intersections. Besides, the officer who spreads the assessment cannot enlarge the improvement by assessing the additional cost as public benefits. While it is not required that the estimate of costs and the ordinance be in all respects identical, it is necessary that the improvement be constructed as described in the ordinance, and no benefits can be assessed to either the public or property owner for

any portion of an improvement not described in the ordinance. The objection should have been sustained.

For the errors indicated the judgment is reversed and the cause remanded.

Reversed and remanded.

HERBERT NICHOLSON, Defendant in Error, vs. BERNHARD LOEFF, Plaintiff in Error.

Opinion filed February 23, 1912—Rehearing denied April 5, 1912.

1. RECORD—*record of a court imports absolute verity.* The record of a court imports absolute verity, and cannot be contradicted or amended except by other matter of record made by or under the authority of the court.

2. APPEALS AND ERRORS—*when question of abbreviated docket entry cannot be raised.* The question of the validity of an abbreviated docket entry of a judgment cannot be raised, where, so far as appears from the transcript, the judgment was, on the day it was rendered, written out in full.

WRIT OF ERROR to the Municipal Court of Chicago; the Hon. WILLIAM N. GEMMILL, Judge, presiding.

LOUIS GREENBERG, for plaintiff in error.

P. L. O'MEARA, (WILLIAM H. SEXTON, and J. KENT GREENE, of counsel,) for defendant in error.

HIRAM T. GILBERT, as *amicus curiæ*.

MR. CHIEF JUSTICE CARTER delivered the opinion of the court:

Defendant in error, Herbert Nicholson, began an action September 2, 1909, against the plaintiff in error, Bernhard Loeff, as surety on an appeal bond. After a trial in the municipal court judgment was entered against plaintiff in error April 30, 1910. This writ of error is sued out on

the ground that section 62 of the Municipal Court act is unconstitutional.

Plaintiff in error argues that the provision of said section which permits abbreviated forms of entries of orders is unconstitutional and void, being in contravention of section 18 of the schedule of the constitution of 1870.

A final judgment written out in full is found in the record. This is apparently an expansion of the abbreviated judgment entry found therein. So far as the transcript shows, it was written out April 30, 1910. It is in conformity with well known and established forms for entering orders in actions on bonds. The bill of exceptions found in the transcript sets forth that on June 14, 1911, plaintiff in error moved to quash the execution, and evidence was introduced showing an abbreviated docket entry of April 30, 1910, and other entries not here involved. The court overruled this motion to quash, but it is not shown in this bill of exceptions that it then ordered the complete record written up or that said abbreviated docket entry of April 30, 1910, was the only docket entry or final judgment order in said cause. There is nothing in the abbreviated docket entry to contradict or impeach the complete judgment order.

The general rule is that the record of a court imports absolute verity, and cannot be contradicted or amended except by other matter of record made by or under the authority of the court. (1 Black on Judgments, secs. 135, 165; *Coughran v. Gutcheus*, 18 Ill. 390; *Metzger v. Morley*, 197 id. 208.) As the transcript in this cause shows that the final judgment was, on the day it was rendered, written out in conformity with established rules of practice, the question of the abbreviated docket entry cannot be here raised.

The judgment of the municipal court will be affirmed.

Judgment affirmed.

KATE M. KEELER *et al.* Plaintiffs in Error, *vs.* THE MERCHANTS LOAN AND TRUST COMPANY, Exr. *et al.* Defendants in Error.

Opinion filed February 23, 1912—Rehearing denied April 3, 1912.

1. *WILLS—rules governing the incorporation of instruments into wills.* To permit the incorporation of another instrument into a will by reference, the will itself must refer to the other instrument as being in existence at the time of the execution of the will and in such a way as to reasonably identify the instrument and show the testator's intention to make it a part of the will; and the instrument must, in fact, be in existence when the will is executed, and must correspond with the description thereof in the will and be shown to be the instrument referred to.

2. *SAME—all requisites must co-exist to authorize incorporation of an instrument into a will by reference.* To authorize the incorporation of an instrument into a will by reference all the elements requisite to such incorporation must co-exist, and the absence of any one of them will prevent the incorporation.

3. *SAME—will must refer to instrument to be incorporated as being in existence.* The instrument to be incorporated into a will must be referred to in the will as being in existence at the time of the execution of the will, and in the absence of a reference to that effect in the will parol evidence is not admissible to show that the instrument was, in fact, in existence when the will was made.

4. *SAME—reference to an instrument "to be" prepared does not incorporate it in the will.* A reference in the will to an instrument "to be" prepared or made prevents such instrument from being incorporated into the will, as there is, in such case, no reference in the will itself to the instrument as being in existence when the will was made.

5. *SAME—what words do not, of themselves, definitely refer to notes as being in existence.* The words, "the principal of any note signed by me," or "any note or notes signed by me," do not, standing alone, refer definitely to the notes as being then in existence but would refer as well to notes to be afterwards signed.

6. *SAME—when entire paragraph of a will sufficiently refers to notes as being in existence.* A paragraph in a will reading, "It is my further will and direction that any note or notes signed by me in favor of any person or persons and made payable by the terms thereof after my decease, be recognized and treated as bequests in behalf of the payees therein, respectively, designated. * * * I

have heretofore, and may hereafter, adopt this means of designating the persons I wish to be remembered as beneficiaries under my last will and testament," sufficiently refers to notes as being then in existence, notwithstanding the intimation that the testator might make other notes after executing the will.

7. Under the above paragraph, notes in existence at the time the will was made and not subsequently destroyed by the testator are sufficiently referred to to permit of their identification, and entitle them to be given effect as testamentary bequests even though no effect could be given to notes made after the will was executed; and as to the notes in existence when the will was executed, the paragraph should be construed as though it did not contain the intimation that the testator might afterwards make other notes to designate beneficiaries.

8. The court reviews the evidence in this case at length, and holds that it sufficiently establishes that there were notes signed by the testator, and payable after his death, in existence at the time the will was executed, but that it does not show that they were in existence at the time of the testator's death or that they were destroyed by other persons after his death.

WRIT OF ERROR to the Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. JULIAN W. MACK, Judge, presiding.

Patrick J. Sexton died October 28, 1903. He left a last will and testament, which was executed July 26, 1902. It was admitted to probate December 1, 1903. Defendant in error the Merchants Loan and Trust Company was named in the will as executor, and upon the probate of the will letters testamentary were issued to it. Sexton left surviving him his widow, Anna L. Sexton, and two sons, Thomas O'D. Sexton and Patrick J. Sexton. Thomas was about twenty-one years old and Patrick J. about nine years at the time of their father's death. One brother, John M. L. Sexton, and three sisters, Mary McAnrow, Kate M. Keeler and Eliza Reilly, survived him, but the latter died shortly after her brother's death and Helen McKeon was appointed her administratrix. Katie McAnrow, Susie Mc-

Anrow, Lucinda Reilly and Eliza B. Reilly were daughters of the sisters Mrs. McAnrow and Mrs. Reilly, and John J. Reilly and Thomas Reilly were sons of Mrs. Reilly. These nephews and nieces survived their uncle, Patrick J. Sexton. The testator left an estate valued at something over one million dollars. His last will was prepared by John N. Jewett, who is now dead. The will is a lengthy document, and as only parts of it are involved in this litigation we shall not set it out in full.

In addition to provisions made in the will for the widow and sons of the testator, by the third paragraph he gave to his brother, John M. L. Sexton, all indebtedness the brother owed him, and directed the cancellation and surrender of all evidences thereof by his executor and released and discharged the brother from all liability by reason of such indebtedness. In addition thereto he directed the payment by his executor to his brother, "as a further legacy and bequest, the full principal amount of any note or notes executed by me in his favor and which he may hold, or which may be held by any other person or persons for his account and benefit at the time of my decease, and which by the terms thereof are made payable after my death." By the fourth paragraph similar provision for the release of all indebtedness to him and the payment of any note held by her or anyone for her account and benefit and signed by the testator and payable after his death was made for his sister Mrs. Reilly, in addition to other bequests in her favor. By the fifth and sixth paragraphs he released his sisters Mrs. McAnrow and Mrs. Keeler from any liability to him on account of any indebtedness they might owe him, and in addition to other bequests directed that the principal sum of any note signed by him and payable after his decease to them, respectively, be paid out of his estate. The ninth and thirteenth paragraphs of the will read as follows:

"Article ninth—It is my further will and direction that any note or notes signed by me in favor of any person or

persons and made payable by the terms thereof after my decease, be recognized and treated as bequests in behalf of the payees therein, respectively, designated, and my executor and trustee is hereby fully authorized and empowered to pay the amount of the principal of such notes out of my estate and property or the proceeds thereof. I have heretofore, and may hereafter, adopt this means of designating the persons I wish to be remembered as beneficiaries under my last will and testament.

"Article thirteenth—In respect to the notes hereinbefore referred to as notes signed by me and by the terms thereof made payable after my decease, it is my further will and direction that they be presented and filed in the usual way as claims against my estate in the proper court having jurisdiction of the settlement of my estate and within the time allowed by law for such settlement, and that when so presented and filed and in the due course of the business of said court they be allowed as just claims against my estate before payment thereof by my executor and trustee, and my executor and trustee is hereby instructed and directed to make no objection to the allowance thereof."

After the death of Patrick J. Sexton no notes payable to any person after his death were found among his papers or effects. On November 30, 1904, which was the last day for filing claims against the estate of Patrick J. Sexton in the probate court, the two sisters, Mrs. Keeler and Mrs. McAnrow, the administratrix of the estate of Mrs. Reilly, the deceased sister, and the four nieces and two nephews above named, presented claims, respectively, based on the contention that Patrick J. Sexton had designated each of the three sisters as beneficiaries to the extent of \$20,000 by notes executed in their favor, respectively, payable after his death; that in the same manner he had designated each of the four nieces as beneficiaries to the extent of \$10,000 and each of the two nephews to the extent of \$5000. These claims were all disallowed by the probate court and appeals

were prosecuted to the circuit court. Upon a hearing in that court they were allowed, and from the judgment of the circuit court the executor and widow prosecuted an appeal to the Appellate Court for the First District. That court reversed the judgment of the circuit court and remanded the cause, with directions to the circuit court to dismiss the proceedings. Upon the petition of the claimants the cases are brought to this court upon a writ of *certiorari*.

As the record, abstracts and briefs are the same in each case, they have been in this court, as they were in the Appellate Court, consolidated and but one opinion will be prepared and filed.

GEO. W. PLUMMER, WHARTON PLUMMER, and SEARS, MEAGHER & WHITNEY, (NATHANIEL C. SEARS, and JESSE J. RICKS, of counsel,) for plaintiffs in error:

Extrinsic evidence was admissible to prove the amounts specified in the notes and the persons to whom such amounts were payable. Underhill on Wills, (1900 ed.) sec. 280; 1 Jarman on Wills, (6th ed.) *99; 1 Redfield on Wills, (4th ed.) *261, 262; Schouler on Wills, (3d ed.) secs. 281, 282; Remsen on Wills, 306, 307; Page on Wills, (1901 ed.) secs. 162, 163; *Newton v. Seaman's Friend Society*, 130 Mass. 91; *Singleton v. Tomlinson*, L. R. 3 App. Cas. 404; *In the Goods of Smart*, L. R. P. & D. (1902) 238; *University College v. Taylor*, L. R. P. & D. (1908) 140; *In re Yockey*, 29 L. T. 699; *Thayer v. Wellington*, 91 Mass. 283; *Bryan's Appeal*, 77 Conn. 240; *Dyer v. Erving*, 2 Dem. 160; *Rose v. Cunynghame*, 12 Ves. Jr. 28; *In the Goods of Watkins*, L. R. 1 P. & D. 18; *Hartwell v. Martin*, 71 N. J. Eq. 157; *Heidenheimer v. Bauman*, 84 Tex. 174; *Hunt v. Evans*, 134 Ill. 496; *Shaw v. Camp*, 163 id. 144; *Habergham v. Vincent*, 2 Ves. Jr. 204; *Hatheway v. Smith*, 65 Atl. Rep. 1058; Wigram on Evidence, 188; *In re Rowe*, 1 L. R. Ch. D. (1898) 153.

The evidence was sufficient to establish the claims. *Gorham v. Dodge*, 122 Ill. 528; *Sanford v. Raikes*, 1 Mer. 646; *Evans v. George*, 80 Ill. 51; *Kavanagh v. Wilson*, 70 N. Y. 177; *In re Immel's Estate*, 59 Wis. 249; *Podmore v. Whatton*, 3 Sw. & Tr. 449; *Jones v. Murphy*, 8 W. & S. 275; *In the matter of Page*, 118 Ill. 576; *Finch v. Finch*, 1 L. R. P. & D. 371.

MCCULLOCH & MCCULLOCH, and HOYNE, O'CONNOR & IRWIN, for defendants in error:

The alleged notes never having been proved or offered for probate in the probate court as a part of the will can not operate as a testamentary disposition of property. Rev. Stat. chap. 148, sec. 2; *Beatty v. Clegg*, 214 Ill. 34.

The probate of a will is necessary in Illinois and cannot be dispensed with even by the testator's direction. *Harris v. Douglas*, 64 Ill. 466; *Hicks v. Deemer*, 187 id. 164; *Beatty v. Clegg*, 214 id. 34.

A testamentary gift cannot be made in the form of an unattested promissory note of the testator. *Williams v. Forbes*, 114 Ill. 167; *Richardson v. Richardson*, 148 id. 563; *Kirkpatrick v. Taylor*, 43 id. 207; *Blanchard v. Williamson*, 70 id. 647; *Pratt v. Trustees*, 93 id. 475; *Shaw v. Camp*, 160 id. 425; *Grove v. Jeager*, 60 id. 249.

The extrinsic papers,—the alleged notes,—not having been established to be a part of the will by direct proceedings therefor in the probate court, they cannot be used to evidence bequests.

A will must be wholly in writing. It cannot rest partly upon a writing and partly in parol. It must be witnessed in accordance with the statute. Rev. Stat. chap. 148, sec. 2; *Graves v. Rose*, 246 Ill. 76; *Oswald v. Caldwell*, 224 id. 224; *Benner v. Bailey*, 234 id. 79; *Vestal v. Garrett*, 197 id. 398.

The law does not permit a will to be supplemented or a blank to be filled by parol testimony. *Engelthaler v. Engel-*

thaler, 196 Ill. 230; *Hunt v. Hort*, 3 Brown's Ch. 258; *Taylor v. Richardson*, 2 Drewry, 16; *Baylis v. Attorney General*, 2 Atk. 239; *Martin v. Ballou*, 13 Barb. 119; *Davis v. Davis*, 8 Mo. 47.

To incorporate an unattested paper into a will it must not only be in existence when the will is made but must be referred to by the will as being already in existence, and must be referred to in such terms that no document made in the future will answer the description, and the will itself must identify the extrinsic document. 1 Jarman on Wills, *99; Page on Wills, sec. 162; 1 Underhill on Wills, sec. 280; Bigelow on Wills, 61, 62; Remsen on Wills, 307; Rood on Wills, sec. 250; Gardner on Wills, 44, 46; Chaplin on Wills, 426; Walkem on Wills, 240; Lovelass on Wills, *304; *University College v. Taylor*, L. R. P. D. (1908) 140; *In re Sunderland*, L. R. 1 P. & D. (1866) 198; *In re Bryan's Appeal*, 77 Conn. 240; *In re Watkins*, L. R. 1 P. & D. (1865) 19; *In re Yockey*, 29 L. T. 699; *Hartwell v. Martin*, 71 N. J. Eq. 157; *In re Truro*, L. R. 1 P. & D. (1866) 201; *In re Reid*, 38 L. J. P. D. & M. (1868) 1; *Heidenheimer v. Bauman*, 84 Tex. 174.

Where the language referring to extrinsic documents is broad enough to apply to a document to be written afterwards, it is not a sufficient reference to any document as then existing. *University College v. Taylor*, L. R. P. & D. (1908) 140; *In re Reid*, 38 L. J. P. D. & M. (1868) 1; *In re Truro*, L. R. 1 P. & D. (1866) 201.

A reference in the will to the instrument incorporated as "made or to be made" does not refer to it clearly as being in existence. Page on Wills, sec. 163; 1 Jarman on Wills, *99; 1 Underhill on Wills, 381, 382; Redfield on Wills, *262, 263; Walkem on Wills, 241.

The law does not permit a testator, by any form or process, to retain the power to change his testamentary gifts,—that is, to keep his will ambulatory,—without complying with the statutory requirements as to writing, signing and

witnessing at a time when witnesses testify that he was of sound and disposing mind and memory. Bigelow on Wills, 61, 62; *Thayer v. Wellington*, 91 Mass. 283; *In re Yockey*, 29 L. T. 699; *Hartwell v. Martin*, 71 N. J. Eq. 157; *Habergham v. Vincent*, 2 Ves. Jr. 204; *Thompson v. Quimby*, 2 Bradf. 449; *Dyer v. Erving*, 2 Dem. 160; *Rose v. Cunynghame*, 12 Ves. Jr. 28; *Chase v. Stockett*, 72 Md. 235; *Johnson v. Ball*, 5 DeG. & Sm. 85; *In re Smart*, L. R. P. & D. (1902) 238; *In re Kehoe*, 13 L. R. Ir. Ch. Div. 13; *Phelps v. Robbins*, 40 Conn. 250.

Mr. JUSTICE FARMER delivered the opinion of the court:

The rules authorizing extrinsic writings to be incorporated by reference to them by the testator in his will, so as to entitle them to be given testamentary effect, will be found stated in all text books on the subject of wills and in many judicial decisions. There is no conflict in the authorities and there can be no misunderstanding as to the rules of law on this subject, but their application to the will in this case is controverted. Three cardinal rules govern the incorporation of an extrinsic writing in a will by reference so as to give the writing testamentary effect. They are sufficiently stated in the following quotations to get a clear understanding of them and no other authorities need be referred to for that purpose:

"From the proposition that a will may be written upon different pieces of paper, connected only by the sense, it follows that a will may by reference incorporate into itself, as completely as if copied in full, some other paper which in itself is not a will for lack of execution. In order so to incorporate, three things are necessary: (1) The will itself must refer to such paper to be incorporated (a) as being in existence at the time of the execution of the will, and (b) in such a way as to reasonably identify such paper in the will, and (c) in such a way as to show testator's intention to incorporate such instrument in his will and to make it a

part thereof. Thus, a paper placed with a will is not a part thereof where the will shows no intention to incorporate it. (2) Such document must, in fact, be in existence at the time of the execution of the will. If this were not the rule, testator could, by executing a will and incorporating therein a document to be executed in the future, create for himself a power to dispose of his property in a testamentary manner by an instrument not executed in accordance with the Statute of Wills. (3) Such instrument must correspond to the description thereof in the will and must be shown to be the instrument therein referred to. In discussing incorporation by reference it must first be observed that these three requisites must co-exist in order to incorporate a foreign paper into the will. The absence of any one of them will prevent such incorporation. The will must refer to the instrument to be incorporated as in existence. A reference in the will to the instrument incorporated as 'made or to be made' does not refer to it clearly as being in existence, nor does a reference to it as a schedule of property 'hereafter named.' Since the document to be incorporated must be referred to in the will as in existence at the date of executing such will, it follows that in the absence of such reference parol evidence is not admissible to show that the document was in existence at the time of executing the will." (Page on Wills,—1901,—secs. 162, 163.)

"In order that a writing extrinsic to the will may be validly incorporated by the reference of the testator to it in the will, three facts must be shown. In the first place, the testator in the will itself must refer to the writing as being in existence at the date of execution; secondly, it must be proved (and this, of course, can only be done by parol evidence,) that the writing was, in fact, in existence at the date of the will; third, the writing which is offered for probate as a part of the will must be identified by the proponent as the writing which was referred to by the testator." (1 Underwood on Wills, sec. 280.)

"The reference must indicate that the writing has already been made,—that is, must speak of it as then existing. It is not enough that the writing was, in fact, made before the will. The will must speak of it as if then made." (Rood on Wills, sec. 250.)

"As to a paper not actually in existence but hereafter to be prepared and executed, no reference in the existing will can give it any valid testamentary effect, independently of its own proper execution as a will in conformity with the statute, hence the testator cannot reserve a power to dispose of property at a future time by what is tantamount to a will informally executed, nor to select a legatee under some subsequent writing. Indeed, the written reference in the will to a paper as something to be afterwards prepared sufficiently debars that paper from being legally incorporated with it, for parol evidence of the time of preparation is held inadmissible to contradict such reference." (Schouler on Wills,—3d ed.—sec. 281.)

Whether any notes are so referred to in the will of Patrick J. Sexton as to bring them within the rules and authorize giving effect to them as bequests, if any such instruments were found among the testator's papers and effects or their unauthorized destruction was proven, depends upon the meaning of the language used in the ninth paragraph of the will.

Patrick J. Sexton made two wills prior to making the one here under consideration. One was made in 1888 and one in June, 1893. The proof as to the existence of the notes upon which the claims of plaintiffs in error are based when the last will was made, in 1902, will be more fully referred to hereafter, but in order to a clear understanding of the discussion to follow, it is proper to state that plaintiffs in error claimed, and their proof tended to show, that designating certain beneficiaries by notes payable after Sexton's death was a part of the scheme of each of the wills he executed, and that he made notes for that purpose on

each occasion when he executed the wills of 1888 and 1893. Plaintiffs in error contend that the notes designating them as beneficiaries were made before and were in existence when the will of 1893 was made, in which language similar to that of the last will was used, and that those notes were never destroyed by the testator but were in existence when the last will was executed and were the notes referred to by the testator in that will.

The language used in the third, fourth, fifth and sixth paragraphs is not a reference to a note or notes then in existence. The direction of said paragraphs that "the principal of any note signed by me" in favor of the persons mentioned in said paragraphs might as well refer to a note afterwards to be executed as to one then in existence, and therefore fails to meet one of the essential tests,—that the writing must be referred to in the will as then in existence. The first sentence in the ninth paragraph is a general direction that "any note or notes" signed by the testator payable after his death "to any person or persons" be treated as bequests in behalf of the payees designated, the principal of such notes to be paid out of the testator's estate. This language, standing alone, would also fail to meet the requirement that the note or notes must be referred to in the will as being then in existence. In the next sentence, which is the only other sentence in the ninth paragraph of the will, the testator says: "I have heretofore, and may hereafter, adopt this means of designating the persons I wish to be remembered as beneficiaries under my last will and testament." Whether, if there were notes of the kind described in existence, they were so referred to as to bring them within the rule mentioned, depends upon the meaning and construction to be given this last sentence of the ninth paragraph.

The first sentence of the paragraph, as we have stated, expresses the will of the testator that notes made payable to persons after his decease and signed by him should be

treated as bequests in favor of the payees. This is immediately followed by the statement of the testator that he had "heretofore" adopted this means of designating persons he wished to remember as beneficiaries under his will. "Heretofore," according to the definition of lexicographers, means "in time past," "previous time," "previously." It is plain from the language itself and the connection in which it is used that the reference was to notes made for the purpose of designating beneficiaries, and was not, as contended by defendants in error, to a will or wills theretofore made for the purpose of designating beneficiaries. It seems entirely clear that if no other language had been used except the statement that the testator had previously adopted, as a means of designating persons he wished to remember as beneficiaries, the making of notes payable to them after his decease, it could be given no other meaning than that he had made notes for that purpose before executing his will. Does the expressed possibility of his designating beneficiaries by making notes after the execution of the will invalidate bequests to persons so designated by notes made before the will was executed? We think not. There is nothing in the language of the will to indicate that it did not, at the time it was executed, fully express the testator's then wishes and purposes with reference to the distribution of his property at his death. There is nothing to indicate that he regarded it as incomplete, or that it was, in fact, incomplete at that time. No effect could be given to notes made after the will was executed, but the expression of the possibility of the testator subsequently adopting that means of designating beneficiaries cannot reasonably be construed to mean that the will was incomplete as to beneficiaries already designated in that manner, or that the purpose of notes to be afterwards made was for the completion of the will.

If the testator had designated beneficiaries in 1893 by making notes payable to them after his decease, there is no

evidence that he ever made any other notes for that purpose. The will contains a definite statement that the testator had previously designated beneficiaries by notes payable to them after his death. That is a reference to writings then in existence and to that extent complies with the law. The testator had been erroneously advised that he could afterwards designate beneficiaries in the same way, and he stated in his will that he might do so. There is, however, no intimation of an intention that the right of the beneficiaries designated before the will was executed, to share in the distribution of his estate to the extent of the principal of the notes, should in any way be dependent upon what he might afterwards do. The will should be construed, as to any notes made before it was executed, the same as if it did not contain the statement that the testator might afterwards make notes to designate beneficiaries. If notes previously made were properly referred to so as to make them valid bequests, the statement that the testator might subsequently designate beneficiaries by notes that would be invalid could not affect those that were valid. We are of opinion the will did refer to notes as then in existence, and if they were, in fact, in existence at the time of the execution of the will and were not subsequently destroyed by the testator, they were sufficiently described so as to be identified and entitle them to be given effect as testamentary bequests.

No notes designating plaintiffs in error as beneficiaries were found after the death of Patrick J. Sexton. Plaintiffs in error sought to prove that the notes were in existence when the last will was made; that they were never destroyed by the testator but were destroyed by the widow, or by her and someone acting with her and under her direction, after or about the time of the death of the testator. If, as we hold, the will referred to the notes as in existence at the time of its execution, parol proof was competent to show that they were, in fact, in existence at that time. This

is supported by the text books and decisions, and we do not understand it is disputed.

Upon the question as to the existence of the notes when the last will was executed, the proof for plaintiffs in error was as follows:

A. S. Bradley, a lawyer, testified he was attorney for Patrick J. Sexton for several years and drew the will executed by him in 1888 and the one executed in June, 1893; that when the will of 1888 was executed Sexton inquired of the witness about designating beneficiaries by notes and incorporating them in the will by reference; that the witness remembered seeing at the time four notes,—one payable to the brother and one to each of the three sisters,—for \$10,000 or \$15,000 each. The witness advised against that method of designating beneficiaries but Sexton insisted on doing it that way, and gave as one reason that he did not want to put in the will the amount of money he desired to give his brother and sisters, because he thought his affairs might prosper and he might make additional notes. The witness said he advised him that “if you want to make some more notes and put in there, all you have to do is to go to John and get the key of the safety deposit vault and unseal your package and put in your notes and seal it up again; that is all you have to do.” The will executed in June, 1893, was prepared by the witness, and he testified it contained substantially the same language with reference to his brother and sisters and designating beneficiaries by notes payable after his death as is contained in the will under consideration. The witness testified that at the time the will was executed the testator had, and exhibited to him, four notes for \$20,000 each, one payable to the testator’s brother and one to each of his sisters; also four notes for \$10,000 each, payable to the four nieces, daughters of his sisters Mrs. Reilly and Mrs. McAnrow, and two notes each for \$5000 or more,—the witness could not remember the exact amount,—payable to two nephews, sons of tes-

tator's sister Mrs. Reilly. The witness stated that the testator had twelve notes, and included notes payable to the sons of Mrs. McAnrow, but neither they nor the brother of the testator are seeking to enforce any claim by reason thereof. The witness stated Sexton asked him what date he should give the notes, and he replied to just write in the date line "June," which Sexton did. The notes were payable in Chicago after testator's decease. After the will was executed Sexton put the notes, with the will, in an envelope, put the package in his pocket and went away. The witness did not afterwards see the notes.

Joseph B. Langworthy, a lawyer, testified he had represented Patrick J. Sexton in some business matters, and that in the latter part of June or early in July, 1903, just prior to Sexton starting on a trip to Europe for the benefit of his health, he talked with the witness about his will. The witness stated it was the day the testimony was closed in *Merchants Loan and Trust Co. v. Egan*, 222 Ill. 494, in which Sexton was interested. The witness testified that during the hearing of evidence that afternoon, Judge Moran, one of counsel in the case, had made some statement about the necessity of the delivery of documents or papers in order to complete a bequest or gift; that Sexton referred to this statement of Judge Moran and said it was different from what he had been advised by Jewett; that Jewett had told him he could evidence bequests by a note, provided he mentioned the note in the will and directed its payment; that he had acted upon that advice and made a will in that way; that Bradley, who was his attorney for a number of years, knew about it, had seen the notes and seen to it that they were drawn in accordance with the will; that he said the bequests made that way were for some members of his family, and he designated them by making notes because he desired to put them on a different footing from other legatees.

Judge Kavanagh testified he had been intimately acquainted with Sexton and his family several years and at one time was his attorney; that after Sexton's return from Europe, in 1903, (he returned in the early part of September of that year,) he had two conversations with him. The first one he did not remember distinctly, but testified Sexton told him about his will and some notes he had executed, which were, in effect, to be legacies to his relatives. The second conversation he stated was about ten days before Sexton's death. Judge Kavanagh testified that Sexton told him he had provided for his relatives by making promissory notes for the amounts he wished them to have, and the judge inquired if he had delivered the notes to the payees. Sexton replied that he had not and that they were then in his possession. He said Jewett thought they were perfectly valid and that he made them under the direction of Bradley. Sexton was very ill, and not wishing to bother him the judge said he replied that Jewett was one of the best lawyers in the city; that Bradley was a very good lawyer, and if they had so advised him he could depend upon it as being the law, but added that he would look it up, and advised Sexton to remain easy in his mind and not bother about it.

James F. Crahen, a lawyer, testified he was in the office of John N. Jewett at the time the last will was executed; that he wrote the will under the direction of Jewett and was one of the witnesses to it; that he heard none of the talk between Jewett and Sexton prior to the preparation of the will, but while it was being written by him, under Jewett's direction, something was said either by Sexton or by Jewett (he thought the latter) about notes, but the witness saw no notes.

None of the above testimony was contradicted, but we have set it out, in substance, rather fully, because it is earnestly argued by defendants in error that it was insufficient to establish the fact that the notes were made and

in existence when the will was executed. It is true, as stated by counsel, that Bradley, at the time he testified, was seventy years of age and was testifying as to matters that occurred several years before, but there is nothing in the record to impeach either his memory or veracity and nothing we can see that would justify refusing to give his testimony credence. We think the testimony must be held sufficient to establish the existence of the notes when the will of 1893 was executed. The testimony of Langworthy and Judge Kavanagh indicates that it was those notes which were referred to by the testator in his conversations with them, and if those notes were in existence when the last will was made and were not afterwards destroyed by the testator, they were sufficiently referred to in the will to entitle them to be given testamentary effect. The notes were not found after the death of Sexton, and it remains to be determined whether plaintiffs in error proved they were not destroyed by him but were destroyed by his widow, or by the widow and someone in connection with her and acting under her direction. The testimony bearing upon this question is voluminous and we shall not undertake to refer to it in detail. A careful consideration of the evidence convinces us that it was insufficient to warrant the conclusion that the notes were destroyed by Mrs. Sexton, or by her and others acting with her or under her direction, about the time or after the death of Sexton.

The notes were never seen by anyone after the execution of the will in 1893, when Bradley said they were placed in a package, with the will, by Sexton and taken away by him. If they were in existence when the will of 1902 was executed they were not exhibited to Crahen, who wrote the will at the direction of Jewett. The proof does not show where the notes Bradley testified about were kept by Sexton after Bradley saw them, in 1893. Sexton had a safety deposit box in a vault of the National Safe Deposit Company at the time of his death. He had had a box in

the vaults of the said company since 1891, but it is not shown by the evidence that either his will or the notes were ever kept there. In August, 1903, he was ill, and went to Europe in the hope of improving or restoring his health. Before departing he delivered to Father Smyth, a Catholic priest, a sealed package about as big as a large envelope and from one and one-quarter to one and three-quarters of an inch thick. The outside wrapper was brown paper and it was sealed with black sealing wax. Father Smyth testified that when Sexton handed him the package he said: "Take this; this is yours; I will write you instructions from the other side." On the outside of the package was written: "This belongs to the Reverend Hugh P. Smyth, who knows my will, and this is to be opened at my death but not before my death." This was followed by the signature of Patrick J. Sexton. He did not write Father Smyth any instructions. He was very ill upon his arrival in London and remained ill until his return, in September, 1903. Upon his return home Father Smyth delivered the package back to him without ever having opened it or learned anything of its contents. This package and a carbon copy of his last will were kept in a satchel in testator's bed-room, where he was confined until his death after his return from Europe. The satchel was kept by the side of or under his bed, and Mrs. Sexton testified he frequently took papers out of it, especially the carbon copy of the will, which he often read and examined. Samuel T. Jacobs was the secretary of Sexton at the time of his death and had occupied that position since the beginning of 1894. The day following Sexton's death this satchel was by direction of Mrs. Sexton delivered to Jacobs, who had gone to the house at her request. The satchel was opened by Jacobs, and according to the testimony the only papers in it were the sealed package and carbon copy of the will. Mrs. Sexton informed Jacobs her husband had told her, in case of his death, to deliver the satchel to him. Jacobs took the sealed package

and carbon copy of the will but left the satchel. He delivered the package and copy of the will to Father Smyth, and stated he had been so instructed by Mrs. Sexton. Father Smyth took the sealed package to the office of his attorney some time afterwards and it was there opened. It contained the will, and probably thirty or forty other papers, and some letters. Just what the papers and documents contained in the package were is not shown, except that some of the papers were deeds signed but no grantees named therein. One deed conveyed the homestead to the testator's brother, John. Father Smyth testified that under instructions of his attorney he delivered certain papers and documents to members of the testator's family, and upon being asked what he meant by members of his family, said he meant his brother, sisters and their children. Some of the papers were notes of the testator's brother and sisters, or some of them, payable to him and secured by mortgage. These Father Smyth delivered to the relatives who made them. The witness was unable to give a correct statement of all the papers and documents found in the package with the will, but says there were no notes payable to the brother, the sisters or the nephews and nieces.

Sexton died about five or six o'clock on the evening of October 28. Some time during the forenoon of that day George Lawrence, a nurse Sexton brought home with him from London and who was taking care of him, prepared an order on D. Peckham, of the National Safe Deposit Company, to allow Mrs. Sexton to open her husband's safety deposit box. Sexton's name was signed to the order by the nurse and he made his mark, which was witnessed by the nurse. Mrs. Sexton met Jacobs at the vault of the safe deposit company between two and three o'clock that afternoon. Jacobs signed the order as a witness and put his notarial seal to it, although he did not see Sexton make his mark. He testified he inquired of Mrs. Sexton and called up Lawrence and inquired of him, and was told by them

that they saw him make his mark to the order. They were admitted to the box, opened it, and both Jacobs and Mrs. Sexton testified they took therefrom three certificates of stock in the Cosmopolitan Safety Deposit Company and some jewelry of Mrs. Sexton and her deceased daughter. They testified nothing else was taken from the box. If the notes had been in the box they then had an opportunity to have secured possession of them, but there is no evidence whatever that the notes were then, or ever had been, in the box. As before stated, when last seen they were placed by Sexton in a package with his will of 1893. It would naturally be expected that the notes and the will would be kept together as long as the notes were in existence. It is certain the will had not been in the safety deposit box for some time, at least, before the testator's death. It is not at all probable that the notes were in the safety deposit box, or that they were taken therefrom on the occasion of the visit of Mrs. Sexton and Jacobs to the vault.

Counsel for plaintiffs in error say there are many reasons for believing that the notes were in the sealed package. We think the evidence entirely insufficient to justify the conclusion that they were in the safety deposit box. Mrs. Sexton and Jacobs both testified in explanation of their visit to the safety deposit box and the reason for it at the time it was made. Jacobs testified Sexton had some stock in the Cosmopolitan Safety Deposit Company, which had gone into liquidation some five years previous, and a check had been made payable to Sexton which he was asked to accept and surrender his certificates of stock. This he had declined or neglected to do, and Langworthy, the lawyer who had charge of the business, told Jacobs if they did not surrender the certificates at once they would lose the money, which was \$2500. The Langworthy referred to is the same Langworthy who had testified on behalf of plaintiffs in error as to a conversation with Sexton about notes. He was not called to testify as to the correctness of Jacobs'

statement, and we take it the testimony of Jacobs upon this subject should be accepted as true. Jacobs testified he notified Mrs. Sexton of this by telephone, and asked her to get an order to open the box for the purpose of procuring the certificates and surrendering them for the \$2500. Mrs. Sexton testified she asked the nurse, Lawrence, to inform her husband about what Jacobs had told her; that he did so, and in pursuance of this the order was prepared and signed in the manner stated. The certificates were taken from the box, surrendered and the money received therefor. In addition to the certificates Mrs. Sexton took from the box the jewelry before referred to. This explanation, we think, relieves Mrs. Sexton of any suspicion on account of her visit to and opening the safety deposit box.

If the notes were in the sealed package they could have been obtained by Mrs. Sexton, or by her and others acting with her, by breaking the package open. It was kept in a satchel in the room of Sexton from the time he returned from Europe till his death, and the satchel was not locked. Miss Gleason was, and had been for some years, the companion of Mrs. Sexton. The family residence of the Sextons was at 1340 Michigan avenue. They had a summer home at Waukegan, and before the death of Sexton Miss Gleason was at the summer home with the young son. The night before Sexton's death she was requested to come to the family residence and bring the son, as Sexton would probably like to see him. She arrived on the morning of the next day, which was the day of Sexton's death. A servant in the family testified that after the death of Sexton Miss Gleason took the satchel from his room, put it under her apron and carried it into a room across the hall. Afterwards the witness went to the room to speak to Mrs. Sexton, and said she found her and Miss Gleason sitting on the side of the bed with the satchel open between them and papers scattered over the bed, and that they were examining papers. Mrs. Sexton testified that after the death of

her husband she requested Miss Gleason to take charge of the satchel and keep it safely until she could deliver it to Jacobs. Miss Gleason testified she took the satchel into the nursery, put it in a closet, locked the door, and it remained there until she took it out the next morning and delivered it to Jacobs. She and Mrs. Sexton both testified they did not have the satchel on the bed in a room, with papers scattered around it, and that they never opened the satchel. Both testified that when Miss Gleason came from Waukegan she brought an accumulation of mail that had been sent there, and some time during the afternoon they went into the spare bed-room and together looked over the mail. Both Mrs. Sexton and Miss Gleason emphatically denied opening the sealed package or ever having seen anything of any notes at any time. Jacobs testified that prior to the delivery of the package to Father Smyth by Sexton, before starting for Europe, Sexton brought a package to the office done up in rubbers and asked the witness to put a heavy paper around it and seal it. The witness testified he put heavy brown paper around it, sealed it up at both ends with black or dark sealing wax, and stamped it with an old seal he thought had been procured from some express company and had the name of the express company on it. He further testified that when the package was delivered to him on the morning after the death of Sexton it had no appearance of ever having been opened but appeared to be exactly in the same condition as when he first sealed it up. He testified he did not open it, but delivered it to Father Smyth just as he received it at Sexton's house. Father Smyth testified that when delivered to him by Jacobs after Sexton's death the package looked the same as when he first received it from Sexton before his departure for Europe; that he could not see any difference in its appearance at that time and when delivered to him by Jacobs.

There was other testimony more remotely bearing on the question but not of sufficient importance to justify re-

ferring to it in detail. If the testimony which we have tried to set out in substance, together with the surrounding circumstances, is too inconclusive to justify finding that the notes were destroyed after or about the time of the death of Sexton, the other evidence in the record is not of a character that would turn the scale in favor of the contention of the plaintiffs in error that the notes were destroyed by Mrs. Sexton, or by her and someone acting with her and at her direction.

Plaintiffs in error contend that Judge Kavanagh's testimony conclusively establishes the existence of the notes ten days before the testator's death, and that the usual presumption that the testator destroyed them himself after that time cannot obtain because of his physical condition, and because no circumstances were shown to have occurred that might have caused him to change his mind and revoke the bequests to plaintiffs in error. Judge Kavanagh testified his visit to the testator when he told him the notes were then in his possession was about ten days before the testator's death. Mrs. Sexton thought it was about three weeks before his death. The fact, alone, that the testator said he had the notes then in his possession does not establish that Mrs. Sexton destroyed them, nor is it sufficient, in connection with all the other testimony, to establish that fact.

Dr. Patrick, the attending physician, testified Sexton had a disease of the spinal cord and anæmia; that his condition varied a good deal but the general tendency was to become worse, and after he became quite weak he had spells of fainting and extreme prostration. His mental condition was good. During a part of his illness the doctor saw him every second day and a part of the time every day. Except when he had fainting spells he was conscious and capable of thinking clearly. The doctor last saw him on the day of or the day previous to his death,—he was not certain which. He said at that time there was nothing to indicate immediate death, although he had previously informed Mrs.

Sexton that he thought her husband could not possibly recover. Mrs. Sexton and Lawrence, the nurse, both testified that some time prior to Sexton's death there were other papers in the satchel than the sealed package and copy of the will; that Sexton frequently examined the papers and tore up and destroyed a good many. Neither she nor any one else claims to know what papers he had destroyed or whether they were notes.

The proof tends to show some unpleasant acts and conduct on the part of some of the relatives of Sexton during his illness, after his return from Europe. To what extent this may have affected him cannot be known, but in the light of the evidence we cannot say the assumption must be indulged that nothing occurred during that period which might have caused him to change his mind with reference to the provisions of his will. Independent of any notes, substantial provisions were made for the brother and sisters of the testator. He held his brother's note for \$40,000, secured by mortgage; also the note of Mrs. Keeler and husband for \$40,000. These were surrendered and the indebtedness canceled under the provisions of the will. Mrs. Reilly was given real estate valued at \$5000 and Mrs. McAnrow real estate valued at \$9500.

Without further extending the discussion, already, perhaps, unnecessarily long, it is sufficient to say that the evidence does not sustain the contention of plaintiffs in error that the notes were in existence at the time of Patrick J. Sexton's death and were destroyed by Mrs. Sexton. This was the view of the Appellate Court, and, independent of its view upon other legal questions involved, its judgment was correct and is therefore affirmed.

Judgment affirmed.

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,
vs. HENRY KAELEBER, Plaintiff in Error.

Opinion filed February 23, 1912—Rehearing denied April 3, 1912.

1. CONSTITUTIONAL LAW—*regulation of the sale of intoxicating liquor by general law is within police power of State.* Regulation of the sale of intoxicating liquor by a general law prescribing the times and places when and where and the circumstances under which it may be sold is within the police power of the State.

2. SAME—*to be general a law need not have effect upon every individual and in every locality in the State.* The requirement that a law shall be general does not mean that the law shall have effect upon every individual and in every locality in the State, as it is only upon individuals and in places where the situation contemplated by the law has arisen that it can have any effect.

3. SAME—*law does not cease to be general because it classifies persons or places.* A law does not cease to be general because it classifies persons or places, if the basis of the classification is necessary to the purpose to be accomplished by the legislation or reasonably appropriate for that purpose.

4. SAME—*fact that law may presently apply to only one place does not make it local.* An act which is general in its nature and uniform in its operation upon all persons coming within the scope of the law is not local merely because it may presently apply only to one place.

5. SAME—*act of 1911, prohibiting sale of liquor near a soldiers' and sailors' home, is not invalid.* The act of 1911, which prohibits the sale of intoxicating liquor within two-thirds of a mile of the boundary lines of any land owned or maintained by the State of Illinois as a soldiers' or sailors' home, is based upon a condition which makes the classification just and reasonable and applies to all places answering the description which now or may hereafter exist, and is not invalid as a local law merely because the State at present maintains only one soldiers' and sailors' home. (*Devine v. Cook County Comrs.* 84 Ill. 590, distinguished.)

6. DRAM-SHOPS—*what condition furnishes valid reason for excluding dram-shops from the neighborhood.* The proximity of a church, seminary, school house, hospital, cemetery, or other public or private religious, educational or eleemosynary institution, is a valid reason for excluding dram-shops from the neighborhood.

7. SAME—*license to keep a dram-shop is not a contract.* A license granted by a city to keep a dram-shop is not a contract and gives no vested rights to the licensee which can be availed of by

him as a defense to an information charging him with selling liquor in violation of a law passed subsequent to his acquiring the license, which prohibits the sale of liquor in the territory in which his dram-shop is located.

WRIT OF ERROR to the County Court of Adams county; the Hon. LYMAN MCCARL, Judge, presiding.

JOHN T. INGRAM, and L. H. BERGER, for plaintiff in error.

W. H. STEAD, Attorney General, and JOHN T. GILMER, State's Attorney, (GEORGE H. WILSON, of counsel,) for the People.

Mr. JUSTICE DUNN delivered the opinion of the court:

The plaintiff in error was convicted in the county court of Adams county of selling intoxicating liquors within two-thirds of a mile of the Illinois Soldiers' and Sailors' Home at Quincy, in violation of an act of the General Assembly approved June 10, 1911, (Laws of 1911, p. 309,) and he has sued out this writ of error, claiming that the act violates section 22 of article 4 of the constitution, prohibiting the passage of local or special laws regulating county and township affairs or changing or amending the charter of any town, city or village.

The city of Quincy, on March 31, 1911, issued to the plaintiff in error a license for one year entitling him to keep a dram-shop at 339 Cedar street, in that city, which place was 1720 feet south of the north boundary line of the city and 2500 feet south of the south and nearest boundary line of the Illinois Soldiers' and Sailors' Home. This is the only home of its kind maintained by the State of Illinois, and is located north and entirely outside of, but adjoining, the city of Quincy, within the town of Riverside. On July 1, 1911, the plaintiff in error was keeping a dram-shop at 339 Cedar street under the authority of the license issued to him, and he then and there sold intoxicating liquors.

The act of June 10, 1911, provides that on and after July 1, 1911, it shall be unlawful to sell, distribute or give away any malt, spirituous, vinous or intoxicating liquors within two-thirds of a mile of the boundary line or lines of land owned or maintained by the State of Illinois as a soldiers' and sailors' home. It is insisted that the act is local and special because the State has but one soldiers' and sailors' home and will probably never have another; because the only territory in which the sale of intoxicating liquor is prohibited extends two-thirds of a mile from the home and is within the limits of the city of Quincy, constituting approximately one-third of the entire territory of the city; and because the city has power, under the general laws of the State, to grant license for the sale of liquor within its limits, and the control of this right is vested, under the general laws and under section 2 of article 9 of the constitution, in the legal voters of the city.

Regulation of the sale of intoxicating liquor by prescribing the times and places when and where and the circumstances under which it may be sold is within the police power of the State, and the authority of the legislature to enact into law the provisions contained in the act in question is not denied by the plaintiff in error, provided the enactment is general and not local or special. Whether the act regulates county or township affairs is a question not presented by this record, for the plaintiff in error is not affected by any such regulations. His right rests solely upon the license granted by the city.

The requirement that laws shall be general does not mean that every statute shall have effect upon every individual and in every locality in the State. Such a construction is impossible. It is only upon individuals and in places where the situation contemplated by the act has arisen that it can have any effect, and a law does not cease to be general because it classifies persons or places, if the basis of classification is necessary to the purpose to be accomplished

by the legislation or reasonably appropriate for that purpose. There are numerous statutes which prohibit the sale of intoxicating liquor to certain persons at certain times, in certain places. Under the Dram-shop act all such sales are unlawful, except such as are made by virtue of a license granted by some municipal authority. The sale of intoxicating liquor is prohibited at all times in some places and at some times in all places. We have recognized the right of a city council to prohibit the sale in certain parts of the city while permitting it in other parts. *People v. Cregier*, 138 Ill. 401; *Moore v. Mayor of Danville*, 232 id. 307.

The act is not local merely because one soldiers' and sailors' home, only, is maintained by the State and the act can therefore operate in but one place. An act which is general in its nature and uniform in its operation upon all persons coming within its scope is a general law. (*People v. Hoffman*, 116 Ill. 587; *Cummings v. City of Chicago*, 144 id. 563; *Park v. Modern Woodmen of America*, 181 id. 214; *People v. People's Gas Light Co.* 205 id. 482.) A law is general, not because it embraces all of the governed, but because it may embrace all when they are similarly situated and come within its provisions. (*Hawthorn v. People*, 109 Ill. 302.) "We have so repeatedly held that a law may be general and yet be operative in a single place or places where the conditions necessary to its operation exist, that, if it were not abandoned, discussion of the question would be unnecessary.—*People v. Hoffman*, 116 Ill. 587; *West Chicago Park Comrs. v. McMullen*, 134 id. 170; *People v. Cregier*, 138 id. 401." *Trausch v. County of Cook*, 147 Ill. 534.

In *West Chicago Park Comrs. v. McMullen*, *supra*, the identical constitutional provision here involved was in controversy. The case involved the constitutionality of a statute authorizing park commissioners to take control of certain city streets upon receiving the consent of the corporate authorities, which the act authorized the latter to give. It

was objected that the act applied to only one city in the State, because Chicago, alone, had parks under the control of park commissioners. It was held that such fact did not render the act local or special, and that it was not requisite that the act should be presently applicable to every person or to every city in the State. It applied to every city having at the time of its passage, or at any time thereafter, parks under the control of park commissioners. The situation here is the same in principle. That proximity to a church, seminary, school house, hospital, cemetery, or other public or private religious, educational or eleemosynary institution, furnishes a good reason for excluding dram-shops from the neighborhood is generally recognized. The existence of this condition furnishes a reasonable basis of classification, and it is this principle which authorizes the legislature, in the exercise of the police power, to pass the act in question. The act is general in terms, and, whether the conditions described exist in one city or many, it applies to all places now within its terms or that may hereafter be within its terms. The classification is just and reasonable and does not violate the constitution. *People v. Board of Supervisors*, 185 Ill. 288.

The case of *Devine v. Commissioners of Cook County*, 84 Ill. 590, differs from this in that the statute there, by its terms, while purporting to classify counties by population, designated the county in such a way as to preclude the law from ever having any application to any other county than the county of Cook, and it was held that such designation was a mere device not based on any principle of classification but intended to evade the constitutional provision against special legislation. There was no classification upon any just or reasonable principle.

The license granted to the plaintiff in error by the city of Quincy was not a contract. It gave him no vested rights and constituted no defense to the information. *People v. McBride*, 234 Ill. 146.

Judgment affirmed.

EDITH TENLEY NORTON, Appellee, vs. GEORGE H. CLARK
et al. Appellants.

Opinion filed February 23, 1912—Rehearing denied April 3, 1912.

1. WILLS—*what evidence is immaterial upon issue of undue influence.* In a suit to contest a will, where one of the grounds is undue influence by the chief beneficiary, evidence tending to show the relations of the chief beneficiary with the husband of the testatrix, or how he treated him, or whether he sought to obtain or did obtain property from him, is irrelevant and immaterial.

2. SAME—*right of contestant to prove conversations with testatrix.* The contestant is entitled to prove declarations of the testatrix, so far as they are relevant to the question of her mental capacity, although they occurred in conversations, and, necessarily, may prove so much of the conversations as will enable the jury to understand the declaration.

3. SAME—*when testimony as to what witness said to testatrix is properly excluded.* In a will contest case, where improper relations between the testatrix and the chief beneficiary are alleged in support of the charge of undue influence, it is proper to exclude a statement by a physician to the effect that when the testatrix told him her daughter was charging her with such improper conduct he said to her to pay no attention to it—that everybody knew it was false.

4. SAME—*general rule as to proving conversations.* Where one party proves a part of a conversation the other party has a right to all that was said at the same time concerning the same subject, since it may qualify or explain what has been testified to; and if a party proves what was said by the adverse party to the suit as evidence against him, such adverse party has a right to prove all that was said by him in the same conversation, provided, only, it relates to the subject matter of the suit.

5. SAME—*what testimony by physician is competent.* In a will contest case, where illicit relations between the testatrix and the chief beneficiary are alleged in support of a charge of undue influence, a physician who had attended the testatrix for a period of fifteen years and was familiar with her physical condition may testify that during all that period her condition was such as to render it very improbable, if not impossible, for her to have committed the acts alleged.

6. SAME—*when conversation between testatrix and attorney is not privileged.* The fact that a witness has transacted business

for the testatrix as her attorney does not preclude his testifying to her mental capacity, and if it is sought to prove by him anything concerning the testamentary disposition of her property, her conversation on that matter, if otherwise competent, should not be excluded as a privileged communication.

7. SAME—*instruction authorizing recovery if evidence preponderates slightly is not applicable to will contest case.* In ordinary cases, where a mere preponderance of the evidence is sufficient, it is not error to give an instruction authorizing a recovery if the evidence preponderates in favor of the plaintiff or complainant, although but slightly; but the rule is otherwise in a will contest case where mental incapacity is charged, as in such case there is the presumption of sanity, which the law raises in favor of every person and which cannot be disregarded.

8. SAME—*declarations of testatrix not admissible to show fraud or undue influence.* Declarations of the testatrix are not admissible to show that the will was executed under duress or undue influence or to show fraud, but they may be proved where they tend to show her mental condition at the time of the execution of the will, or so near to the time that the same state of affairs must have existed.

9. SAME—*when objection that instruction is based upon incompetent evidence cannot be urged.* If no objection is made to the introduction of incompetent evidence, it cannot be urged, on appeal, that an instruction was based upon the hypothesis of fact which such incompetent evidence tended to prove.

10. SAME—*instructions giving particular force to testimony of certain witnesses are improper.* Instructions are erroneous which call attention to particular witnesses or single out a fact and give it undue prominence and controlling effect in the case.

11. SAME—*effect of illicit relations between testatrix and chief beneficiary.* The existence of illicit relations between the testatrix and the chief beneficiary does not raise any presumption of undue influence unless other improper influence is shown to have been exerted to induce the making of the will, in which case the illicit relations may be considered, with the other facts, in determining whether the influence was undue.

APPEAL, from the Circuit Court of Knox county; the Hon. GEORGE W. THOMPSON, Judge, presiding.

EDWARD J. KING, and WALTER C. FRANK, (FLETCHER CARNEY, of counsel,) for appellants.

CHIPERFIELD & CHIPERFIELD, CHARLES J. TRAINOR, MALCOLM G. JEFFRIES, and ADDISON J. BOUTELLE, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The appellee, Edith Tenley Norton, is the daughter and only heir-at-law of Sarah A. Tenley, who died at the age of fifty-nine years on October 23, 1909, under a surgical operation for the removal of a tumor, in the hospital at Galesburg. Three days before her death and in contemplation of the expected operation she executed her last will and testament, by which she bequeathed to appellee \$500, to her nephew, Roy W. Burden, \$10,000, to three friends \$100 each and to another friend \$200, and gave the remainder of her estate to her son-in-law, George H. Clark, who had been the husband of appellee but had been divorced from her. The will was admitted to probate, and appellee filed her bill in the circuit court of Knox county against the appellants, who were the legatees and devisee under the will, and the executor of the will, to set it aside, alleging that at the time of its execution the testatrix was not of sound mind and memory and that she executed it under undue influence exercised by George H. Clark. Aside from general charges of undue influence the specific fact alleged was, that the testatrix and Clark for many years had maintained illicit relations with each other, and that Clark threatened to expose such relations to the public unless the testatrix yielded to him and executed the will by bequeathing to him the greater part of her estate. Answers were filed denying the charges of mental incapacity and undue influence, and an issue was formed and submitted to a jury whether the writing was the will of the testatrix. The jury returned a verdict that the writing was not her will, and the court, after overruling a motion for

a new trial, entered a decree setting aside the will. From that decree an appeal was taken to this court.

Sarah A. Tenley was the wife and widow of James M. Tenley, a merchant at Farmington, Illinois. They had one daughter, the complainant, Edith Tenley Norton, who was married about the year 1887 to the defendant George H. Clark. From the time of the marriage the parties all lived together as one family, and in January, 1889, a child was born of the marriage. About 1893 the complainant went to a medical school at Keokuk, Iowa, and in the same year and about the time of the World's Fair she went to Chicago, where she has since resided. Her husband, the defendant Clark, was in the shoe business in Farmington and continued to live with the family. The child also lived there most of the time but was with his mother in Chicago awhile, and after returning to Farmington died on April 14, 1895. The complainant attended a medical school in Chicago and graduated in 1897, and since that time has practiced medicine in Chicago. She never returned to Farmington except as a visitor or temporarily. She obtained a divorce from Clark in 1902, and in 1904 was married to her present husband, Fay Norton. After the complainant left home the relations between her and her mother were always friendly except when Clark was involved. She was at enmity with him, and, at least after the divorce, she objected to his being at the home or having anything to do with the family, and when he was there she would not go there. Clark continued to live in the family until about 1895, when he sold out his shoe business and left Farmington. After that he was a commercial traveler or in business in Chicago, and in 1904 he was married again, and after that his residence was on a farm near Beloit, Wisconsin. He came to Farmington occasionally and stopped at the Tenley home, and was called for at different times and always responded by coming and rendering any service required. In October, 1907, James M. Tenley,

whose left side was paralyzed, was advised to go to California, and he insisted that Clark should go to Farmington and accompany him and the testatrix. Clark complied with the request, and while in California James M. Tenley died on December 27, 1907. The testatrix continued to live at Farmington until the fall of 1908, when she moved to Galesburg and resided there until her death. During the time that Clark lived in the Tenley family the testatrix had severe spells of sickness, one of them lasting eight or ten weeks, and Clark was accustomed to take care of her. He performed several disagreeable services which are usually performed by nurses of the same sex, and took turns with the doctor or others in sitting up nights or getting up during the night and performing these services, which usually fell upon him because of the difficulty of obtaining help for that purpose in Farmington, a place of about two thousand inhabitants. During these ministrations he was often in her room in his night clothes, and when she was not ill it was their custom to kiss each other when they met in the morning. They were accustomed to say "Good morning," and he always called her "mamma" and she called him "George" or "George, dear," and that was the time when they were in the habit of kissing each other. He usually spoke of her to others as "mamma." Under the will of James M. Tenley she received half of his estate and the complainant received the other half, each share being about \$60,000. After the death of James M. Tenley, in December, 1907, the property was in the hands of the executor until the settlement of the estate. After the death of James M. Tenley the testatrix made eight or ten wills, in all of which Clark was the principal beneficiary. She died owning personal property amounting to \$55,000 and real estate worth \$4000. The will in question was executed on October 20, 1909, and two days before that she made a will giving \$10,000 to the complainant, \$5000 to Burden, \$5000 in trust to the Burden children, and the balance to

Clark. On the same day that will was executed, Fay Norton, husband of complainant, notified Alfred C. Steenburg, executor of the will of James M. Tenley and banker of the testatrix, who had much to do with her business and who drew all her wills except the last two and is executor of the will now in question, that a bill would be filed by the complainant, Mrs. Norton, in the circuit court of Fulton county, on that day for the recovery of money from Clark alleged to have been given him by James M. Tenley; that there would be three days before the statements made in the bill would be made public and prompt action would have to be taken, and that the charges of the bill were very damaging to the character of the testatrix, mother of the complainant therein. Steenburg called up the testatrix by telephone and advised her of the information he had. On October 20, 1909, the testatrix made the will in question and told the witnesses that a short time had made a great change in her plans. For about fifteen years before her death she suffered from a fibroid tumor of the uterus, and of late it had grown to great size, so as to weigh from fifteen to twenty-five pounds, and it had progressed to a point where she could not live very long unless an operation was performed. The surgeon told her that she had one chance in a hundred to live through the operation, and she said she would take the chance. She died in the hospital immediately after the operation. Clark was not present when the will was drawn and had nothing to do with its preparation but asked the witnesses to attend and act as witnesses to the will. There was much testimony about the relations of Clark with James M. Tenley, but those matters had no relevancy to the issue. The relations of Clark with James M. Tenley, or how he treated him, or whether he sought to obtain, or did obtain, property from him, were not material to the decision of the question whether he exercised undue influence over the testatrix.

At the conclusion of the evidence the defendants asked the court to direct a verdict in their favor on the ground that there was no evidence of mental incapacity or undue influence, which the court refused to do. On the question of mental capacity there were about twenty-five witnesses who had been well acquainted with the testatrix and had good opportunities to know her mental capacity, who testified that she was of sound mind and memory. About one-fifth as many, most all of whom had seen the testatrix for short periods of time in Chicago but who qualified to give an opinion, thought she was of unsound mind. Their opinions, however, were based on what she said and did during difficulties and controversies between her and her daughter about Clark, and had no relation to her ability to comprehend business affairs or manage her property. No fact was testified to which would show any want of mental capacity or inability to transact business or any deviation from the usual workings of a sane mind, but there were opinions of several witnesses that she was not of sound mind. Although a verdict for the complainant upon that issue would have been against the clear preponderance of the evidence and would not have been permitted to stand if the court had been authorized to weigh the evidence, there was sufficient testimony for the complainant to permit the jury to pass upon the question. The court was also justified in submitting to the jury the question of undue influence, and there was no error in refusing to direct a verdict.

The physician of the testatrix testified to a conversation with her in which she said that her daughter had charged her with conduct of which she was perfectly innocent, and he replied that he would pay no attention to it,—that everybody knew it was false. The court struck out his reply and did not err in that ruling, as it was not competent to get the opinion of the witness before the jury in that way. It is urged that a different rule was applied in the examination of witnesses for the complainant, and particularly

as to one witness who was permitted to state what she said in a conversation with the testatrix. In that case the remark of the witness was necessary to make intelligible what the testatrix said. The complainant was entitled to prove declarations of the testatrix so far as they were relevant to the question of her mental capacity although they occurred in conversations, and necessarily might prove so much of the conversation as would enable the jury to understand the declaration. The court, in ruling on the objection, said that the complainant was entitled to the whole conversation, and afterward, perhaps with that understanding, witnesses gave what they said expressing their opinions on the question at issue, and even told what the complainant said and that she advised her mother to give up her life of shame. When one party proves a part of a conversation, the other party has a right to all that was said at the same time, limited to the same subject, since it may qualify or explain what has been testified to. (*Black v. Wabash, St. Louis and Pacific Railway Co.* 111 Ill. 351.) Or if a party proves what was said by the adverse party to the suit as evidence against him, such adverse party has a right to prove all that was said by him in the same conversation, provided, only, it relate to the subject matter of the suit. (*Morris v. Jamieson*, 205 Ill. 87.) In this case the cross-examination did not come within either rule.

The court, on motion of the complainant, struck out the answer of the physician who had attended the testatrix for a period of fifteen years before her death and had made frequent examinations of her at various times, in which he gave it as his opinion that during all that period it would have been very painful for her, and almost impossible, to have committed any act such as she was charged with. The physician was qualified to give an opinion, and it was based upon physical examinations while attending her as her physician. He had stated quite fully the con-

ditions existing, and it was error to exclude his professional opinion.

The court also struck out the testimony of an attorney and refused to permit him to testify further because the matter was privileged. The attorney had transacted business with the testatrix and had not testified, and, so far as appears, did not propose to testify, to any privileged communication. He said he had met her probably half a dozen times and had conversations with her; that she said another attorney was getting ready to start a partition suit and asked about making parties, and that they also talked over general matters. There was nothing in his testimony about any matter involved in this suit, and apparently he was merely qualifying to give an opinion as to her mental condition, which would have been proper although he was her attorney. If it was intended to prove by him anything about the testamentary disposition of her property, it would not, if otherwise competent, be excluded as a privileged communication. (*Scott v. Harris*, 113 Ill. 447; *Wilkinson v. Service*, 249 id. 146.) The court erred in that ruling.

The court gave an unreasonable number of instructions, there being thirteen given at the request of the complainant and thirty-four given at the instance of the defendants, some of them of great length and in the aggregate stating about every conceivable question which could arise in a will contest, and most of them several times. It is impracticable to repeat any of them at length. The thirteenth given at the request of the complainant told the jury that if the evidence upon the question of mental capacity or undue influence preponderated in favor of the complainant, although but slightly, it would be sufficient for the jury to find in her favor. That kind of instruction was introduced into the practice in *Taylor v. Felsing*, 164 Ill. 331, which was an action on the case, where the court could not say that it was error to give it, and since the decision in that case it has become very common. It belongs to the same

class as instructions which assume that the evidence may be evenly balanced and that there may be nothing which inclines the mind to one side or the other, and both are the natural product of our system, created and enforced by statute, for advising the jury as to the law, under which instructions are not formulated in the judicial mind but are written by attorneys and advocates, whose every effort is to state the law as strongly as possible in behalf of their clients. In ordinary cases, where a mere preponderance of the evidence is sufficient, it cannot be said that it is error to give such an instruction, but a different rule has always been applied in testing the validity of a will. The law presumes every person to be of sound mind, and when a will has been executed with the formalities required by law, it has always been held that the evidence of incapacity must clearly preponderate to authorize the setting aside of the will. (*Carpenter v. Calvert*, 83 Ill. 62; *Wilbur v. Wilbur*, 129 id. 392; *Taylor v. Pegram*, 151 id. 106; *Craig v. Southard*, 162 id. 209; *Egbers v. Egbers*, 177 id. 82; *Entwistle v. Meikle*, 180 id. 9; *Wilkinson v. Service*, *supra*.) It was error to give the instruction that a slight preponderance of the evidence before the jury would justify a verdict against the will, regardless of the presumption of sanity.

The sixteenth instruction stated a correct rule of law, that it was necessary the testatrix, at the time of signing the will, should have been capable of knowing what her property was and who were the natural objects of her bounty, and be able to understand the natural consequences and the effect of the act of executing her will. It was not necessary that she should have had sufficient capacity to hold all those things in her mind at the same time, (*Carpenter v. Calvert*, *supra*.) but the absence of either element would render her incompetent. (*Dowie v. Sutton*, 227 Ill. 183.) That rule was applied to this case by instructing the jury that if the testatrix was not capable of knowing

who were the natural objects of her bounty they must find against the will, and if they believed that she did not understand the nature and consequences of the execution of the will, then in that case they must find against it,—and there was no evidence tending to show either fact. The rule that a testatrix must have been capable of knowing who were the natural objects of her bounty is exceedingly vague to the ordinary mind, but there was no evidence tending in any degree to show that the testatrix did not know that the complainant was her only heir-at-law and the natural object of her bounty, or that she did not know what her property was nor understand the natural consequences and effect of executing her will. She gave the complainant only a small bequest for reasons which were entirely satisfactory to herself, whether they were such as ought to have influenced her or not.

The nineteenth instruction told the jury that if the testatrix, when she signed the writing, did not know its contents because her mental condition was such that she could not understand it, they should find against the will; and the twenty-second made the same statement as to the testatrix having sufficient mind and memory to remember her property and relatives. There was no evidence upon which to base either instruction.

The twentieth instruction related to capacity to comprehend a few simple details as contrasted with capacity to remember many facts and details, and it had no application to the case where there were no complicated details in the will or with respect to the property.

The eighteenth instruction was unintelligible. It directed the jury to find against the will although no undue influence was used, if they believed from the evidence, considered with the presumption of sanity, if the jury believed the complainant made out a *prima facie* case as defined in the instruction at the time of making the will the mind of

the testatrix was impaired to the extent mentioned in the instruction.

The forty-fifth instruction advised the jury that if they believed, from the evidence, that during a considerable space of time prior to the making of the will illicit relations existed between the testatrix and Clark, and that he threatened if she discontinued such relations he would publicly declare them and thereby disgrace and degrade her, and that by reason thereof he obtained such a degree of control over her as to make her subservient to his will and thereby procured the making of the instrument, they should find it was not her will. It is urged that this instruction was based upon incompetent evidence; and that is true, since the only evidence of any threat on the part of Clark was incompetent. But the evidence was not objected to. A witness testified to statements of the testatrix corresponding with the hypothesis of fact in the instruction, and the daughter of that witness testified to the same statements. The declarations of a testator are not admissible as proof of the facts stated, and he cannot invalidate his will by declarations made either before or after its execution. They are not admissible to show that a will was executed under duress or undue influence or to show fraud, but they may be proved where they tend to show the mental condition of the testator at the time of the execution of the will or so near the time that the same state of affairs must have existed. (*Dickie v. Carter*, 42 Ill. 376; *Reynolds v. Adams*, 90 id. 134; *Massey v. Huntington*, 118 id. 80; *Bevelot v. Lestrade*, 153 id. 625; *Hill v. Bahrs*, 158 id. 314; *England v. Fawbush*, 204 id. 384.) The evidence of statements by the testatrix was not offered to show mental incapacity, and it would have had no tendency whatever to show any aberration of mind or mental unsoundness, and having no tendency to prove a want of mental capacity would not have been permissible for that purpose. If the testatrix made the statement, it was nothing but a narra-

tion of immoral acts and a threat of exposure on the part of Clark, and the evidence was offered, not to show mental incapacity, but for the purpose of proving the facts of illicit relations, threats of exposure and consequent fear. The complainant was grand commander of an order of women called True Kindred, and a witness who was appointed by her grand marshal of the order testified that the name of the testatrix was on the charter list; that the testatrix told her she had improper relations with her daughter's husband, Mr. Clark, and the witness said that under those circumstances she could not be a member of the order. The testatrix had applied for membership and the witness said she withdrew her application. The evidence was incompetent, but it was not objected to, and on cross-examination the fact was brought out that the organizer of the order went to Farmington and made an unfavorable report of the testatrix, which the witness presumed was based on her reputation at Farmington. None of this testimony was objected to, and complaint cannot now be made of giving the instruction based on the hypothesis of fact which the incompetent testimony tended to prove. The defendants could waive their objection to the testimony by not objecting to it, and if regarded as competent it had a tendency to prove the fact.

There is a serious objection, however, to the instruction. So far as the alleged threat and consequent fear were concerned, it was aimed directly at the testimony of the two witnesses, and, giving it a special force and effect, practically told the jury that if they believed that what the two witnesses said the testatrix told them was true they should find against the will. Instructions are erroneous which call attention to particular witnesses or single out a fact and give it undue prominence and controlling effect in the case. (*Hewett v. Johnson*, 72 Ill. 513; *Craig v. Miller*, 133 id. 300; *Wickes v. Walden*, 228 id. 56.) The existence of an illicit relation does not raise any presumption

of undue influence unless other improper influence is shown to have been exerted to induce the making of the will, such as the supposed threat, but it is a fact to be considered by the jury along with other facts in the case, provided there is proof, in addition to the fact of the unlawful relation, tending to show constraint or interference or undue influence. If there is proof that the beneficiary has exercised influence, the existence of an unlawful relation may be considered for the purpose of determining whether the influence was undue, but not otherwise. *Smith v. Henline*, 174 Ill. 184; *Snell v. Weldon*, 239 id. 279; *Dickie v. Carter*, *supra*.

For the errors pointed out the decree is reversed and the cause is remanded.

Reversed and remanded.

CHARLES F. JOHNSON, Defendant in Error, vs. THE ROYAL NEIGHBORS OF AMERICA, Plaintiff in Error.

Opinion filed February 23, 1912—Petition stricken April 3, 1912.

1. BENEFIT SOCIETIES—*when party taking applications is agent of a society.* One who, at the request of a district deputy of a benefit society, takes applications for membership for the purpose of organizing a lodge of the society, to which he is admitted without payment of dues, and the applications taken by him are accepted by the society, must be held to act as the society's agent in taking the applications.

2. SAME—*rule where the agent does not correctly write the answers given by applicant.* If the applicant for membership in a benefit society gives true answers to the questions in the application but the agent of the society writes false answers, the society waives its right to object to the validity of the benefit certificate on the ground that the answers were warranties; and this rule is not affected by the fact that there was a printed request in the certificate that the holder read the copy of the application attached thereto and notify the society if any answers were incorrect.

3. SAME—*purpose of by-law requiring member to be in sound health at delivery of the certificate.* The purpose of a by-law of a

benefit society requiring a member to be in sound health at the time the certificate was delivered is to protect the society from liability in consequence of a disease contracted by the member between the time of the application and the delivery of the certificate.

4. SAME—*when a refusal to give instruction concerning health of beneficiary at time certificate was delivered is not error.* It is not error to refuse to give an instruction authorizing a verdict for the defendant society if the jury believed, from the evidence, that the member was not in sound health at the time of the delivery of the certificate, even though the society has a by-law providing that its liability shall not begin until the certificate is delivered to the member, who is then in sound health, where there is no evidence tending to show the member's condition of health had materially changed between the taking of the application and the delivery of the certificate, at which time it is shown she was in sound health.

5. SAME—*it is not error to refuse to give substantial repetitions of instructions.* It is not error to refuse to give instructions the principles of which have been announced in other instructions given to the jury.

WRIT OF ERROR to the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Cass county; the Hon. HARRY HIGBEE, Judge, presiding.

BENJAMIN D. SMITH, TRUMAN PLANTZ, and J. JOSEPH COOK, for plaintiff in error.

MILTON MCCLURE, for defendant in error.

Mr. JUSTICE FARMER delivered the opinion of the court:

Amelia Johnson made a written application July 28, 1906, for membership in the Royal Neighbors of America, a fraternal insurance society, a camp of which was about to be installed at Bluff Springs, near where the applicant lived. After passing through the regular channels the application was approved, Mrs. Johnson initiated as a member of the order, and on October 20, 1906, a benefit certificate for \$1500, in which the husband, Charles F. Johnson, was named as beneficiary, was issued to her. All dues and as-

sessments were paid on the certificate until the death of Mrs. Johnson, which occurred June 21, 1907. Proofs of death were made in accordance with the requirements of the order but payment of the certificate was refused, and the beneficiary brought this suit in the circuit court of Cass county to recover thereon. Plaintiff below had judgment for the amount of the certificate in the circuit court, from which the defendant appealed to the Appellate Court for the Third District. That court affirmed the judgment, and the case is brought to this court by writ of *certiorari*.

The defense to the suit is based upon the claim that Mrs. Johnson made false answers to certain questions she was required to answer in her application, and that the answers to these questions were warranties and not mere statements or representations. The following are the questions contained in the application, with the answers appended thereto, upon which the plaintiff in error based its refusal to pay the certificate:

"15. Are you now of sound body, mind and health, free from disease or injury, of good moral character, of exemplary habits and a believer in a supreme being?—Yes.

"16a. Have you within the last seven years been treated by or consulted any person, physician or physicians in regard to personal ailment?—No.

"19a. Have you within the last three years used any patent or proprietary medicine?—No.

"19h. Have you ever had any local disease, personal injury, illness of any kind or nature, serious or otherwise?—No."

In a list of questions required to be asked of the applicant by the camp physician, and answers thereto written down by him, was the following:

"31. Have you ever had any disease of the following named organs or any of the following named diseases or symptoms: Heart?—No. Liver?—No. *La grippe*?—No. ^r any other disease?—No."

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To the fifteenth question the answer is written "Yes" and to each of the other questions "No." It is contended the answers to all these questions were warranties; that they were false, and there can therefore be no recovery. It is insisted the proof shows Mrs. Johnson was at the time of her application, and had been for a considerable period of time prior thereto, suffering from disease; that she had been treated by Dr. Bley and other physicians; that her disease was pronounced by Dr. Bley pernicious anæmia, which affected the heart, and that her death resulted therefrom. While the evidence as to the condition of the applicant's health at the time she made application for membership in the order, and for some time previous and subsequent thereto, is quite contradictory, the proof is she had consulted physicians about illness she was suffering from at various times since 1902 and had taken medicines prescribed for her at different times. Some, at least, of the answers to questions propounded to the applicant were untrue, but defendant in error contends that the circumstances under which they were made take the case out of the rule contended for by plaintiff in error.

It appears from the evidence that the local camp of the order of Royal Neighbors of America at Bluff Springs was installed by Mrs. Gilliland, a district deputy. A short time previous to its establishment an effort had been made to install a camp by Mrs. Cartwell, an assistant deputy, but the effort failed. Mrs. Cartwell took the application of Mrs. Johnson, and George Franer testified he was present when the same questions above quoted were asked Mrs. Johnson by Mrs. Cartwell and heard her answers thereto; that she said she had been treated by physicians and had taken patent medicine for the "grippe;" that Mrs. Cartwell told Mrs. Johnson that did not count, and wrote the answers contrary to the true answers made by Mrs. Johnson. After Mrs. Cartwell had failed to secure enough applications for membership to authorize installing a camp,

Mrs. Gilliland, the district deputy, wrote Franer requesting him to procure applications, sent him blanks for that purpose, and stated that when he had secured them she would come and organize the camp. Pursuant to Mrs. Gilliland's request Franer proceeded to procure applications for membership, among them Mrs. Johnson's, and Mrs. Gilliland came and organized the camp. He was admitted to membership in the camp without the payment of any initiation fee, and plaintiff in error received, adopted and acted upon the applications taken by him. Franer testified that when he took Mrs. Johnson's application she told him of illnesses she had had, and that he knew she had taken treatment from physicians but wrote her answers contrary to the true answers made by her, just as Mrs. Cartwell had done. Franer testified that at that time Mrs. Johnson appeared to be in good health, and many other witnesses testified to the same thing.

The Appellate Court held the evidence warranted the conclusion that Franer, in taking the application of Mrs. Johnson, was the agent of plaintiff in error, and we agree with that view. His knowledge was therefore the knowledge of his principal. If, as the evidence of defendant in error tends to show, Mrs. Johnson made true answers to the questions propounded, but Franer, the agent, wrote false answers, plaintiff in error has waived its right to object to the validity of the benefit certificate on the ground that Mrs. Johnson's answers were warranties. (*Royal Neighbors of America v. Boman*, 177 Ill. 27; *Farrenkoph v. Holm*, 237 id. 94.) The principle applied in these cases is not new in this State but has been uniformly announced and adhered to in a long line of cases. Decisions of courts of other jurisdictions holding a contrary view have never been followed in this State. This rule is not affected by the fact that a copy of the application was attached to the benefit certificate, and there was printed in the certificate a request to the holder to read the application and if any of

the answers were incorrect to notify plaintiff in error's recorder. The agent of plaintiff in error having been informed by Mrs. Johnson of facts contrary to the answers written by him, she was led to believe that the answers written to the questions propounded were, under the facts stated, the proper answers, and nothing is shown to have subsequently occurred to cause her to doubt that her certificate was perfectly valid. Question 31 above quoted was not one of the questions Franer asked of Mrs. Johnson. It was one of a list of questions to be asked by and answered to the camp physician. The camp physician did not testify, but other witnesses present when he wrote the answers to the questions on Mrs. Johnson's application testified they thought he did not read the questions to Mrs. Johnson but simply filled the blanks by writing answers to the questions without reading them to the applicant.

Complaint is made of the court's rulings in giving instructions for defendant in error and refusing instructions asked by plaintiff in error. Under our view of the law there was no error in this respect, nor in the admission or rejection of testimony offered, that calls for a reversal of the judgment.

The judgment of the Appellate Court is therefore affirmed.

Judgment affirmed.

Subsequently, on petition for rehearing, the following additional opinion was filed:

Per CURIAM: A rehearing was granted in this case at the December term on the petition of the plaintiff in error, upon the ground that the trial court had erred in declining to give to the jury defendant's twelfth instruction, which reads as follows:

"The court instructs the jury that if you believe, from the evidence, that Amelia Johnson was not in sound health at the time of the delivery of the benefit certificate here

sued on to her, then said benefit certificate never became in force, and your verdict must be for the defendant."

One of the by-laws of the association provided that the liability of the association upon a benefit certificate should not begin until the actual manual possession of the benefit certificate had been delivered to the member and who was then "in sound health," and it is said as the evidence was conflicting upon the question as to whether Amelia Johnson was in sound health on the day the benefit certificate was delivered to her, the court erred in not submitting the question to the jury whether she was in sound health on the day the benefit certificate was delivered to her, and if the jury found she was not in sound health on that day, then the court should have instructed the jury that there could be no recovery upon said benefit certificate. We think it is clear the by-law in question was adopted by the association for the purpose of protecting itself from liability in consequence of a disease contracted by a member subsequent to his application for membership and before delivery to him of the benefit certificate, as in the course of business a considerable space of time might elapse between the date of application and the date of delivery to him of the benefit certificate. In this case the evidence tended to show that Amelia Johnson had been in ill-health for a considerable length of time prior to the time she applied for membership in the association of plaintiff in error, but there was no evidence which tended to show there was any material change in her physical condition between the date of her application and the date of the delivery to her of the benefit certificate, and the evidence was overwhelming in favor of the defendant in error upon the proposition that at the time of the delivery of the benefit certificate Amelia Johnson was in sound health. If there had been any evidence which fairly tended to show a change in the physical condition of Amelia Johnson between the date of her application and the date of the delivery to her of the benefit

certificate the instruction should have been given, but as there was no proof of that kind introduced on the hearing there was no evidence upon which to base the instruction, and if it were held that the by-law was broad enough to defeat recovery if it appeared that Amelia Johnson was not in sound health on the date of delivery of the benefit certificate to her, regardless of when disease was contracted, then the refusal of the instruction was harmless error, as the evidence upon the proposition that Amelia Johnson was in sound health at the time of the delivery of the benefit certificate to her was so overwhelming that the jury could only have found one way upon that proposition. We therefore conclude that the court did not commit reversible error in declining to give to the jury the twelfth instruction offered by plaintiff in error.

It is also urged in the petition for rehearing that the court erred in declining to give to the jury the twenty-fifth instruction offered by plaintiff in error. The office of that instruction was to inform the jury that if Amelia Johnson did not fully disclose the condition of her health in response to all interrogatives propounded to her, the association could not be held to have waived a forfeiture of the benefit certificate here sued on. The principle stated in this instruction was announced in other instructions which were given to the jury. We do not think, therefore, the court committed reversible error in declining to give to the jury the twenty-fifth instruction offered by plaintiff in error, as the jury were fully instructed upon the proposition sought to be submitted by that instruction.

We have again examined this record and have reached the same conclusion that we did at the time the original opinion was adopted and filed. The opinion heretofore adopted will therefore be re-adopted and re-filed and the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

THE PEOPLE *ex rel.* Charles A. Kellogg, County Collector,
Appellee, *vs.* HARRY E. BROWN, Appellant.

Opinion filed February 23, 1912—Rehearing denied April 3, 1912.

1. DRAINAGE—*amount of assessment is limited by the benefits derived.* The authority for special assessments by drainage districts is conferred by section 31 of article 4 of the constitution, and the amount of any assessment is limited to the benefit derived from the work the assessment is levied to pay for.

2. SAME—*classification merely fixes the proportion of assessment which the lands shall bear.* The classification of the lands in a drainage district merely fixes the proportion of the assessment which the lands shall bear of any lawful levy that may be made, and does not deprive the land owner of the right to have the question determined whether the assessment exceeds the benefits.

3. SAME—*when objection that assessment exceeds benefits may be made on application for judgment.* A land owner in a drainage district has a right to a hearing, at some time and in some forum, on the question whether the benefits are equal to the assessment; and where the assessment is levied on a certificate that a certain amount is necessary for repairs for the ensuing year and to meet a deficiency in payment for repairs previously made, he may properly urge the objection on application for judgment and order of sale.

4. SAME—*land owner has a right to impeach certificate of levy.* A land owner has the right to show, on application for judgment and order of sale, that while the certificate of levy on which the assessment is based on its face purports to be for repairs to be made and for a deficiency in payment for repairs previously made, it was, in fact, levied to pay for work done and to be done not in pursuance of the original plan.

5. SAME—*there can be no valid levy to pay for an obligation not in existence.* There can be no valid levy of a drainage assessment to pay for an obligation which has no existence nor to meet an indebtedness created in advance for original work of any kind.

6. SAME—*digging new ditches and widening and deepening old ones is not repair work.* Digging new ditches and making the original ditches deeper and wider than they ever were is not repair work.

7. SAME—*section 70 of Farm Drainage act construed as to deficiency in payment for repairs.* Section 70 of the Farm Drainage act, assuming it to be constitutional, is the only authority in the

act for making a levy for work already done, and implies a previous levy for the purpose of repairs and some shortage or deficiency in the amount estimated.

8. *BILLS OF EXCEPTIONS—when bill of exceptions cannot be altered.* A bill of exceptions cannot be altered by the affidavit of an attorney in the case or by a certificate of the judge that he does not know whether the bill he signed was correct or not.

APPEAL from the County Court of Henry county; the Hon. LEONARD E. TELLEEN, Judge, presiding.

HARRY E. BROWN, (BARTLETT S. GRAY, of counsel,) for appellant.

CHARLES E. STURTZ, State's Attorney, and HENRY WATERMAN, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The county collector of Henry county applied to the county court of said county for judgment against lands of the appellant for a delinquent drainage tax levied on November 30, 1910, by the commissioners of the Big Slough Special Drainage District in Henry and Whiteside counties, to which the appellant filed twenty-three objections. The court struck from the files thirteen objections, overruled the remainder and rendered judgment for the amount of the tax.

The levy was for \$5800, based on a certificate of the commissioners that \$1300 was necessary to keep the drains and ditches in repair for the ensuing year and \$4500 was necessary to meet a deficiency in payment for repairs previously made. The first objection which was stricken from the files related to jurisdiction and was waived by the general appearance. The second, fourth, fifth, sixth, twelfth, thirteenth and fifteenth were either not specific or attempted to raise questions not open to consideration, and the court

did not err in striking them from the files. The court erred in striking from the files the third objection, that there was no sufficient certificate of levy. The latter part of the tenth and the fourteenth and sixteenth objections were that the appellant's lands were assessed more than they would be benefited by the work done and proposed to be done, and that was a good objection. The authority for special assessments by drainage districts is conferred by section 31 of article 4 of the constitution, and the amount of any assessment is limited to the benefit derived from the work which it pays for. The power to levy such assessments is necessary to the organization and existence of drainage districts and the reclamation of swamp and overflowed lands, but the land owner has a right to the protection of the constitution and the law, and is not the lawful prey of the officials entrusted with authority to levy assessments. He has a right to a hearing on the question whether the benefits are equal to the assessment, somewhere and in some forum, before he can be compelled to pay, and the only opportunity appellant had was upon the application for judgment against his land. Counsel misapprehend the purpose of the original classification of the land when they insist that the amount appellant was to pay was then determined. The classification only fixed the proportion which his land should bear of any lawful levy that might be made. Nothing had ever been settled except the proportion which he should pay, and he had a right to make the objection and have it heard and determined. (*People v. Welch*, 252 Ill. 167.) The court erred in striking those objections from the files.

The nineteenth objection was that the levy was to pay for work done and to be done not in pursuance of the original plan although on its face it was for repairs, and the twenty-third alleged the unconstitutionality of section 70 of the Farm Drainage act. We know of no reason why the appellant might not question the constitutionality of sec-

tion 70, and he had a right to show that there was, in fact, no deficiency of \$4500 in payment for repairs previously made, but that the sum was required to pay for new and original work done without authority of law. There can be no valid levy to pay for an obligation which has no existence. (*People v. Cairo, Vincennes and Chicago Railroad Co.* 252 Ill. 395.) The commissioners have no power to incur or create in advance any indebtedness for original work of any kind and then levy an assessment to meet it. (*Winkelmann v. Moredock and Ivy Landing Drainage District*, 170 Ill. 37; *Ahrens v. Minnie Creek Drainage District*, id. 262; *Vandalia Drainage District v. Hutchins*, 234 id. 31; *Morgan Creek Drainage District v. Hawley*, 240 id. 123.) These objections ought not to have been stricken from the files.

The drainage district was organized more than thirty years ago, and it appears that in August, 1910, lands were added to the district and an indebtedness incurred in digging a new ditch for their benefit. On November 7, 1910, the commissioners filed with the county clerk an order reciting that lands added to the district on August 30, 1910, required the construction of a main outlet in addition to those then possessed by the district, and ordering the engineer to report recommendations and an estimate of the cost of the construction of the outlet and an estimate of the amount which the new lands should be taxed. On November 17, 1910, they filed the statement required by section 70 of the Farm Drainage act, showing the following items: Excavation, \$4352.80; attorney's fee, \$402.90; commissioners' services, \$419.90; for repairing ditch and material, \$363.76; engineer's services, \$83.50; publishing, \$25.50; collector's commissions, \$9.96;—aggregating \$5658.32. On November 30, 1910, they made the certificate of levy.

The appellant called one of the commissioners as a witness and proved by him that the commissioners kept no

books or records showing the financial condition of the district; that they paid their money out by warrants and could only tell about their affairs by the stubs and reports of the county treasurer; that they let a contract to William McNeil for excavating branch ditches and deepening and widening ditches; that new work was done and all ditches were made deeper and wider than the original ditches; that they borrowed \$1000 to pay McNeil on a new ditch on branch No. 1, and that they paid McNeil \$4076.70. Digging new ditches and making original ditches wider and deeper than they ever were was not repair work, and this evidence tended to show that the greater part of the levy was illegal. The court, however, struck out all this evidence on motion of the attorney for the collector to exclude all of the evidence in the record except the record evidence and the oral testimony identifying it. The collector has filed a supplemental abstract of an affidavit made by the State's attorney and a certificate of the judge, which were filed in the clerk's office at the same time as the bill of exceptions and which we are asked to consider. The affidavit of the State's attorney says that at the time of settling the bill of exceptions he asked to have it corrected so as to show that his motion was to exclude all testimony as to the contents of written instruments, and the judge certifies that such an objection was made and that he had no distinct or independent recollection of the motion or his ruling, but from the notes of the reporter the bill of exceptions is correct. The bill of exceptions cannot be altered by the affidavit of the State's attorney or a certificate of the judge that he does not know whether the bill he signed was correct or not.

It is insisted by counsel for the collector that no evidence could be heard questioning the certificate of levy if on its face it appeared to be for objects within the authority given by the law; that no oral testimony could be received that a written document was false and the object stated therein had no existence, and that the records of the drainage com-

missioners are the only lawful evidence of their action, and cannot be contradicted, added to or supplemented by parol. If there must be a record of the commissioners to sustain a levy it appears that there was no such record, and the position of counsel as to impeaching a certificate of levy is not correct, as we have said.

Section 70 of the Farm Drainage act authorizes the commissioners to make a statement, annually, on or before the first day of December, to be filed with the county clerk, showing, among other things, the amount, if any, necessary to be levied to keep the work in repair for the year next ensuing, and also the amount of any deficiency in payment for repairs made. Nothing is said in argument in support of the objection stricken from the files that it violates any provision of the constitution, and we therefore assume that it is free from any such objection. It is the only authority in the act for making a levy for work already done, and implies a previous levy for the purpose of repair and some shortage or deficiency in the amount estimated. In this case there does not appear to have been any previous levy for repairs which unexpectedly proved insufficient, and it needs no argument to demonstrate that an attorney's fee of \$402.90, and other items in the statement filed, could not be included in the description of a deficiency in an estimate for repairs. Changes in the rate of wages or cost of material or some unlooked for contingency might create a deficit within the meaning of section 70, but such a levy as this for such a district could not be justified under that section.

The judgment is reversed and the cause remanded.

Reversed and remanded.

ROBERT C. THORNE, Appellant, vs. EMIL JUNG, Appellee.

Opinion filed Feb. 23, '12—Leave to file petition denied April 3, '12.

1. APPEALS AND ERRORS—*when no certificate of evidence is necessary.* Where all of the correspondence which is relied upon as showing an agent's authority to make a contract of sale is set out in a bill for specific performance and the answer thereto, such correspondence becomes a part of the record without a certificate of evidence; and the rule that where a bill is dismissed for want of equity appellant must preserve the evidence, by certificate, in order to show that the bill was improperly dismissed does not apply.

2. PRINCIPAL AND AGENT—*what does not authorize agent to enter into a contract.* A letter from the owner of real estate to an agent with whom the property had been listed, saying that if the agent's proposed customer will pay the price stipulated "I will sell" the property, and directing the papers, in case of a sale, to be made out by a certain trust company, "to whom I will give the necessary instructions if you make the sale," etc., does not confer authority upon the agent to make a contract of sale which will bind the owner. (*Jones v. Howard*, 234 Ill. 404, followed; *Hedrick v. Donovan*, 248 id. 479, distinguished.)

APPEAL from the Circuit Court of Cook county; the Hon. JOHN GIBBONS, Judge, presiding.

NING ELEY, (ROBERT N. HOLT, of counsel,) for appellant.

WILLIAM SLACK, for appellee.

Mr. JUSTICE VICKERS delivered the opinion of the court:

This is an appeal from a decree dismissing, for want of equity, a bill filed for the specific performance of a contract for the sale of real estate. The contract sought to be enforced was made with appellant by J. A. Wendell & Co., real estate agents doing business in the city of Chicago. The authority of Wendell & Co. is contained in certain letters written by appellee, Jung, who was a resident of the State of California. The principal controversy between the par-

ties concerns the extent of the agent's authority. The cause was heard upon the bill, answer, replication and a written stipulation signed by the parties. There is no certificate of evidence in the record.

Appellee contends that since a decree dismissing a bill for want of equity requires no evidence to support it, the duty rests upon appellant to preserve, by certificate, the evidence showing that the court improperly dismissed the bill. As a general rule appellee's position is correct. (*Kelly v. Funkhouser*, 171 Ill. 205.) It is true, as contended, that a decree dismissing a bill needs no supporting evidence, since such a decree may be rendered for want of evidence to support the bill. (*First Nat. Bank of Chicago v. Baker*, 161 Ill. 281.) But the above rule contended for has no application to the case at bar, for the reason that all of the correspondence which is relied on as conferring authority upon Wendell & Co. to execute the contract in question is set out in the bill and answer thereto. All matters set out and admitted by the pleadings become a part of the record without being preserved by a certificate of evidence. (*Bressler v. McCune*, 56 Ill. 475; *Stevison v. Earnest*, 80 id. 513; *Dilworth v. Curts*, 139 id. 508.) There was no necessity for a certificate of evidence in this case.

On February 10, 1911, appellee, in reply to a letter of inquiry from Wendell & Co., wrote them, saying that he was willing to dispose of the property in question; that his price was \$13,500, and saying that "if you think that you can dispose of the lots you can list the property, and in case of a deal I will pay two and one-half per cent commission." In this letter appellee informed Wendell & Co. that there was a \$4000 mortgage on the property, and that he had listed the property for sale with A. D. Harding on the same terms mentioned to Wendell & Co. On February 18 Wendell & Co. acknowledged the receipt of this letter, and said: "We shall be pleased to bear same in mind at the figure you want for it, \$13,500, and will submit it when-

ever the opportunity offers." On March 18, 1911, Wendell & Co. wrote appellee, saying that they had a client who had intimated that he would consider the purchase of the property on the basis of \$12,000, and advising appellee that they thought it would be to his interest to authorize them to close the deal on that basis. Replying to this letter, appellee wrote, under date of March 25, as follows:

"Your favor of the 21st inst., with copy of your favor of the 18th inst., which did not reach me, and tax bill for 1910, is duly to hand and contents carefully noted.

"It is a fact that Madison street has developed very slowly in the last ten years, but I am satisfied that the next few years will bring a great change in values on Madison street west of Fortieth avenue—what I would call the 'new west side.' The territory north and south of this district is building up so rapidly that a new business center will be created, and my corner will make an ideal location for a department store. However, I am willing to make a concession and split the difference if your customer can make the deal a cash transaction. In other words, I will sell the corner for \$12,750.

"You know there is a mortgage of \$4000 on the property which is held by Mr. M. C. Clancy, who has an office at 84 LaSalle street, and who holds the abstract. The mortgage can be paid at any time, but should your customer want to assume it in order not to be obliged to raise so much cash, he can make arrangements with Mr. Clancy. I also want to state that I own a guarantee policy issued by the Chicago Title and Trust Company, which I will turn over to the prospective buyer.

"I have always closed my real estate deals through the Chicago Title and Trust Company, and if you should be able to close this deal, please have the papers made out by them and let the deal go through their escrow department. This I found out is always the most satisfactory way for both parties, and I am willing to pay the charges of the escrow department.

"Your commission, which would amount to \$318.75, you can retain out of the earnest money and turn over the balance to the title and trust company, to whom I will give the necessary instructions, if you make the sale.

"I give you these informations to save time, should the deal be made, and await your further good news.

"Yours very truly,

EMIL JUNG."

Upon the receipt of this letter Wendell & Co. entered into a written contract for the sale of the premises involved, to appellant. The contract was dated April 1, 1911, and on that day Wendell & Co. telegraphed appellee: "Your letter received; have practically closed deal; will write Monday." It appears from subsequent correspondence, and before appellee had any notice that Wendell & Co. had entered into a contract, that appellee had sold the premises through his agent, Harding. The Harding sale was closed on April 6. The first notice appellee received of the contract having been entered into by Wendell & Co. with appellant was on April 8.

Appellee contends that the authority contained in his letter of March 25 did not extend to the making of a binding contract of sale, and that, even if such authority was given, there was such a departure by the agents from the prescribed terms that he is not bound by the contract. We are of the opinion that this case cannot be distinguished from *Jones v. Howard*, 234 Ill. 404, and that, properly construed, the letter of appellee of March 25 did not empower Wendell & Co. to enter into a binding contract of sale, and that the only authority intended to be delegated was to find a purchaser who was willing to buy the property upon the terms stated.

Appellant relies with apparent confidence upon the case of *Hedrick v. Donovan*, 248 Ill. 479. The authority of the agent in the Donovan case was a written power under seal, authorizing the agent to "sell and transfer" the real estate referred to. In construing the authority there given, importance was attached by this court to the use of the word "transfer" in connection with the word "sell," and it was held that a fair construction of the language used indicated that the owner contemplated the making of an agreement that would bind the principal. In the letter of authority in the case at bar appellee says: "I am willing to make a concession and split the difference if your customer can

make the deal a cash transaction. In other words, I will sell the corner for \$12,750." Further on he says: "I have always closed my real estate deals through the Chicago Title and Trust Company, and if you should be able to close this deal, please have the papers made out by them and let the deal go through their escrow department." Then again he says in the letter, "I will give the necessary instructions if you make the sale." All of the language of the letter must be construed together, and when thus considered we think the case falls under the authority of the *Jones-Howard case* and other cases which hold that a mere general authority to sell or "to make a sale" will not ordinarily be held to confer authority to enter into a binding contract.

Since in our opinion the decree below may be sustained for want of authority in Wendell & Co. to make the contract, it is not necessary to consider the question whether the contract exceeded the terms prescribed in the appellee's letter.

There was no error in dismissing appellant's bill, and the decree of the circuit court of Cook county will be affirmed.

Decree affirmed.

JAMES FAGAN, Appellee, vs. MIRIAM C. BACH *et al.*
Appellants.

Opinion filed February 23, 1912—Rehearing denied April 3, 1912.

1. PAYMENT—when law presumes payment of debt. The law presumes, until the contrary is shown, that a debt which for a period of over twenty years has been due and unclaimed by the creditor and unrecognized by the debtor has been paid.

2. SAME—when presumption of payment must obtain in a suit at law. Where the last payment under the terms of a contract for the purchase of land has been due for over twenty years, during which time the purchaser has been in the exclusive possession of the land without any claim by the vendor or his heirs that the purchase money has not been paid or any recognition by the purchaser of the debt as existing, it will be presumed, in an action

for the purchase money or in an action of ejectment, that the purchase money has been paid.

3. *BURNT RECORDS*—*bare legal title cannot be established under the Burnt Records act.* If the holder of the legal title to land has sold the land and the purchase money has been paid he is not entitled to have the title established in a Burnt Records proceeding, but in such case the purchaser may, under a cross-petition and proof of payment of the purchase money, have his title established.

4. *SAME*—*presumption of payment from lapse of time applies as a defense to Burnt Records proceeding.* Where the last payment under a contract for the purchase of land has been due for more than twenty years, during which time the purchaser has been in the exclusive possession of the land without any claim by the vendor or his heir that the purchase money has not been paid or any recognition by the purchaser that the debt exists, it will be presumed, in a proceeding under the Burnt Records act by the heir of the vendor, that the purchase money has all been paid and that the purchaser is entitled to a deed, and unless the petitioner rebuts this presumption he cannot have his title established.

APPEAL from the Superior Court of Cook county; the Hon. FARLIN Q. BALL, Judge, presiding.

TINSMAN, RANKIN & NELTNOR, (EINAR C. HOWARD, of counsel,) for appellants.

CHARLES L. BARTLETT, and SHERMAN C. SPITZER, for appellee.

Mr. JUSTICE HAND delivered the opinion of the court:

The appellee, James Fagan, filed his petition under the Burnt Records act for the purpose of establishing title in himself, in fee simple, to lots 3 and 4, except the part thereof taken and dedicated for an alley, in Fagan's subdivision of that part of lot 10 lying west of the Chicago, Rock Island and Pacific railroad, in School Trustees' subdivision of section 16, township 38, north, range 14, east of the third principal meridian, in Cook county, Illinois, to which petition the appellants were named as defendants. The petitioner prayed that the court would investigate and consider the matters and things stated and charged in said petition,

and would find, determine, establish and decree the title, in fee simple, to said premises to be in the petitioner, and would re-establish and confirm of record the chain of title to said premises of the petitioner, and decree that said defendants have not, nor any of them, any right, title, interest, claim or lien in, to, upon or against said premises, and that they be perpetually enjoined and restrained from asserting any right, claim, title or interest in or to said premises, and that the petitioner be put into the possession of said premises. The appellants filed a joint answer to said petition, in which they denied that appellee was the owner in fee of said premises, and averred that prior to October 3, 1873, Patrick S. Fagan, the father of the petitioner, and through whom, by descent, the petitioner claims title to said premises, was the owner of the said premises in fee, and averred that on that day said Patrick S. Fagan entered into a contract in writing with Peter Bach, the father of appellants and through whom they claim title, for the sale of the said premises, as follows:

“ENGLEWOOD, *October 3, 1873.*

“I, the undersigned, have sold to Peater Bache lots 3 and 4 in Fagan’s subdivision for thirteen hundred dollars, one hundred paid to me on this day, the balance to be paid in six years, in yearly payments of two hundred dollars each, with interest at ten per cent.

P. S. FAGAN.”

—whereby, for and in consideration of \$1300, said Patrick S. Fagan sold to said Peter Bach said premises, which contract was filed for record and was recorded in the recorder’s office of Cook county on October 27, 1893; that on the date of said contract said Peter Bach paid to said Patrick S. Fagan of said purchase money the sum of \$100 and took possession of said premises, and thereafter paid to the said Patrick S. Fagan the balance of said purchase money, and became thereby owner of said premises and entitled to a deed from Patrick S. Fagan conveying the legal title thereto to him; that Patrick S. Fagan died June 13, 1905, without having conveyed the legal title to said prem-

ises to Peter Bach; that Peter Bach died March 12, 1906; that from the date of said contract to the date of his death said Peter Bach remained in possession of said premises, and that from the date of the death of said Peter Bach to the date of the filing of said petition the appellants, as the children and heirs-at-law of Peter Bach, continued in the possession of the premises and were in possession of said premises at the time said petition was filed, and averred they were the absolute owners of said premises; denied that the appellee was the owner of said premises or entitled to the relief, or any part thereof, prayed for in said petition, and asked that they might be dismissed out of court with their reasonable costs. The case was referred to a master in chancery to take the evidence of the respective parties and to report his conclusions as to the facts and the law. The master heard the evidence and prepared a report, in which he found that the premises in question, on October 3, 1873, belonged to Patrick S. Fagan; that on that date he sold said premises to Peter Bach; that Peter Bach paid \$100 on said purchase and took possession of said premises and remained in possession thereof until his death, since which time the appellants, the children and heirs-at-law of Peter Bach, have continued in possession of said premises and were in possession of the same at the time the petition herein was filed, and that the appellee had succeeded to the rights of Patrick S. Fagan in said premises. The master also found that there was no evidence that any part of said purchase money, other than the \$100, the payment of which has been acknowledged in said written contract, had been paid, and that there remained, so far as the evidence showed, unpaid of said purchase money the sum of \$1200, and found that the appellee was entitled to the relief prayed for. Objections were filed before the master to said report and overruled, and again renewed as exceptions in the superior court and overruled. A decree was entered by the superior court establishing the title of

the appellee to said premises in fee and barring the appellants of all interest in said premises, and canceling said contract as a cloud upon the title of appellee and perpetually enjoining appellants from asserting title to said premises, and directing appellants to surrender the possession of said premises to appellee and confirming his possession and title to said premises. From that decree the appellants have prosecuted an appeal to this court.

If the appellants had been able to establish, by competent and satisfactory proof, that Peter Bach had paid the entire purchase money agreed to be paid to Patrick S. Fagan by him for said premises, there can be no question but the appellee must have failed in this suit, as the payment of said purchase money would have invested Peter Bach with the full equitable title to said premises, and the only interest which Patrick S. Fagan would have had in said premises would have been the bare legal title, which he would have been required to convey to Peter Bach by a court of equity, and the bare legal title remaining in Patrick S. Fagan would not have been such a title as should have been registered under the Burnt Records act, but on cross-petition in this case, had proof of the payment of the purchase money been made, the absolute title to said premises would have been established in the appellants and would have been properly registered in them. The main question, therefore, between the parties to this suit, and the one which has been principally argued in the briefs filed in this case, is, can the want of direct proof of the payment of the balance of the purchase money due upon said premises, as evidenced by said writing, be supplied by that presumption of payment which ordinarily obtains when a debt has been due for more than twenty years, during which period the debt has not been claimed on the one side to be due or on the other recognized as due? The question by the admission of the parties to be decided in this case is therefore narrowed to this: Will the law presume the purchase money due on the

said contract to have been paid by reason, alone, of the lapse of time and deny to appellee relief, or will the title of appellee be established unless competent and satisfactory proof that the purchase money evidenced by said contract has been paid is produced by appellants?

That the law presumes a debt which has been due and unclaimed and without recognition for twenty years to have been paid is unquestioned. In *McCoy v. Morrow*, 18 Ill. 519, it was said, on page 524: "After the lapse of twenty years, debts, of whatever degree, are presumed to have been satisfied, and this presumption will defeat a recovery on them unless rebutted by proof." And in *McCormick v. Evans*, 33 Ill. 327, it was held that where money has been due, under a contract for the purchase of land, for more than twenty years the law presumes its payment; and this statement of the law was recognized as correct in *Chicago and Northwestern Railway Co. v. Galt*, 133 Ill. 657. (See, also, *Alston v. Hawkins*, 105 N. C. 3.) In a note to this case where it has been reported in 18 Am. St. Rep. 875, the editor states: "Independently of the Statute of Limitations, the law raises a presumption, in the absence of explanatory evidence, that a debt which has been due and unclaimed and without recognition or payment of interest for twenty years has been paid,"—which statement, we believe, is a fair statement of the law and one that is supported by the great weight of authority in England and in this country.

We therefore conclude that the presumption that the balance of the purchase money due upon said contract had been paid would obtain upon a suit brought upon the contract to recover the said purchase money and that the suit would fail. We are also of the opinion that in an action of ejectment to recover the possession of the land by the appellee, against the appellants, the same rule would obtain, and the suit would be defeated on the ground that the law presumed the debt to have been paid. While the weight of

authority outside of this State is perhaps to the contrary, clearly such was the holding in *McCormick v. Evans*, *supra*. The question remains, however, will such presumption obtain in a suit like this, filed under the Burnt Records act?

The appellee urges the rule is universal that such presumption does not obtain in aid of an attack but if allowable at all it must be in support of a defense, and that a presumption of payment cannot be invoked in support of a defendant's title in a suit under the Burnt Records act as the parties to such a suit are both aggressors, the defendant no less than the petitioner, and in support of that position he cites *Smith v. Hutchinson*, 108 Ill. 662, *Gage v. Caraher*, 125 id. 447, and *Gage v. Gentzel*, 144 id. 450, where it is held that the petitioner is not required to show, by allegation or proof, that the defendant's title is invalid, but the burden rests upon the defendant to aver and establish by proof his own title, if he desires to do so. In this case no cross-petition was filed and the defendants asked no affirmative relief. The appellants, at most, sought to repel the attack made upon their title by the appellee, and if it were conceded that the presumption of payment may only be used as a shield and for the purpose of defense and that it can not be used as a sword and for the purpose of attack, we are unable to see how it can be said that presumption is sought to be used for the purpose of attack in this case. If the appellants had filed a cross-petition and sought to establish their title as against the appellee, then, clearly, they would have ceased to act upon the defensive and have become aggressors. This they did not do but acted on the defensive, only, and we think they might rightfully, in that state of the record, invoke in support of their defense the presumption of payment arising from the lapse of time, and if they can invoke such presumption, as that presumption was not rebutted, the entire amount of the purchase money evidenced by the contract of sale must be regarded as paid and the petitioner can have no relief. In *Beattie v. Whip-*

ple, 154 Ill. 273, it was held that a title would not be registered under the Burnt Records act as against parties who had acquired title by adverse possession; and again, in *Happ v. Happ*, 156 Ill. 183, it was held a grantee in an unrecorded deed who permits the grantor and those claiming under him to remain in possession and control of land, as absolute owners, for more than thirty years, without asserting his title, will be held to be barred from asserting title to the premises under the Burnt Records act. The ancestor of the appellants went into possession of the premises in controversy on October 3, 1873. The purchase money all became due in 1879, and no action was taken by the vendor or his heir to re-claim possession of said premises until the year 1910, and we think the presumption ought to obtain, unless rebutted, that the purchase money was paid and that Peter Bach was entitled to a deed which he had never received, or that a deed had been delivered to him which had not been recorded and had been lost or destroyed. The presumption of payment is one that may be rebutted, and would be easily rebutted in a case where the vendor remained in possession of the land, but, as here, where the vendee has remained in possession of the land for the length of time that intervened between the date when the debt fell due and the date of the filing of this petition, the presumption of payment ought to be held to be almost conclusive.

We have considered this case thus far upon the view that the presumption of payment, as applied to this case, was invoked solely as a defense. If, however, it may not properly be said to be invoked by way of defense, still we are of the opinion that under the circumstances of this case the presumption of payment ought to obtain as against this purchase money debt. The law formerly was that the Statute of Limitations could not be used as a sword but could only be used as a shield. This view has now been very much modified, and a limitation title in this State may be used as a means by which to reclaim the possession of land

as well as a means of defense. In *Kepley v. Scully*, 185 Ill. 52, it was said, on page 55: "It is now well settled that an adverse possession for a period of twenty years may not only be used as a defense to the title thereby acquired, but it may be enforced by affirmative action, either against a third party or against the original owner, where the latter succeeds in obtaining possession after the bar of the statute has become complete. In other words, title by an adverse possession of twenty years may be used as a sword to attack with when such possession is disturbed." While the presumption of payment rests upon a different ground from the Statute of Limitations, the presumption of payment being rebuttable while the statutory bar is not, we see no reason, if a title built up under the Statute of Limitations can be used for the purpose of attack, why a title which rests upon the presumption of payment after twenty years cannot be used for the purpose of attack,—at least to the extent of defeating a petition under the Burnt Records act where the party relying upon such presumption is in possession of land which is sought to be taken from him after his possession has remained unchallenged for a period of more than twenty years. We are of the opinion, whether the appellants' position is treated as a defensive one or as an aggressive one, to the extent of defending their title against the attack of appellee they have the right to invoke, until it is rebutted, the presumption of payment relied upon by them in this case. The appellants asked no affirmative relief. They do not, therefore, stand in the position of a party who invokes affirmative relief, as does a party who files a bill for specific performance or files a cross-bill or cross-petition under the Burnt Records act and relies upon the presumption of payment to establish his title.

The decree of the superior court will be reversed and the cause will be remanded to that court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, vs.
THOMAS SHAW *et al.* Appellants.

Opinion filed February 23, 1912—Rehearing denied April 4, 1912.

1. MUNICIPAL CORPORATIONS—words "county judge" and "judge of county court" are used interchangeably with reference to village organization. A petition for village organization may be properly addressed to the judge of the county court, as it is evident from a comparison of article I of the Cities and Villages act, concerning the organization of cities, with article II of said act, concerning the organization of villages, that the words "county judge" and "judge of the county court" are used interchangeably and synonymously in both articles.

2. SAME—petition for village organization is properly filed with clerk of county court. A petition for village organization is properly filed with the clerk of the county court, as some of the proceedings must be made a part of the records of the county court.

3. QUO WARRANTO—respondent not required to show that election notices remained posted for fifteen days. Section I of article II of the Cities and Villages act, providing that notices of an election on the question of village organization shall be posted "for at least fifteen days prior to holding such election," does not require the respondents in a *quo warranto* proceeding to test the legality of the organization, to prove not only that the notices were posted fifteen days before the holding of said election, but also that they remained posted continuously during such fifteen days.

APPEAL from the Circuit Court of Fulton county; the Hon. R. J. GRIER, Judge, presiding.

O. J. BOYER, for appellants.

W. H. STEAD, Attorney General, (CHIPERFIELD & CHIPERFIELD, of counsel,) for the People.

Mr. CHIEF JUSTICE CARTER delivered the opinion of the court:

This is an appeal from a judgment of ouster entered by the circuit court of Fulton county against appellants, as officers of the village of Norris, upon an information in the

nature of *quo warranto*. In July, 1908, a petition was filed for the incorporation of certain territory in said county as a village. An election was held on August 17, 1908, and eighty-one votes were cast for and twenty-seven against organization. September 22, 1908, an election was held for village officers, and appellants were elected, respectively, president, trustees and clerk of said village. Shortly thereafter leave was granted to file this information. Appellants filed an amended plea, setting forth the proceedings for the organization of the village and election of village officers. A demurrer to this was sustained and judgment of ouster entered. This appeal followed.

The chief contention arises over the construction of the sections of the statute governing the organization of villages, as to whether the petition for such organization must be addressed to the county judge and filed with the county clerk, or addressed to the judge of the county court and filed with the clerk of the county court. Sections 5, 6 and 7 of article 11 of the Cities and Villages act, (Hurd's Stat. 1911, p. 359,) which relate to the matter in controversy, read, in part, as follows:

"Sec. 5. Any thirty legal voters resident within the limits of such proposed village may petition the county judge of the county in which they reside, to cause the question to be submitted to the legal voters of such proposed village, whether they will organize as a village under this act. And if the territory described in said petition shall be situated in more than one county, then the petition shall be addressed to the judge of the county court of the county where a greater part of such territory is situated. Such petition shall be addressed to the county judge.

"Sec. 6. Upon the filing such petition in the office of the county clerk, it shall be the duty of such judge to perform the same duties * * * as is above required to be performed by the president and trustees in towns already incorporated. The returns of such election shall be made

to the county judge, who shall call to his assistance any two justices of the peace, and canvass such returns, and cause a statement of the result of such election to be entered upon the records of the county court.

"Sec. 7. If a majority of the votes cast at such election is for village organization under the general law, such proposed village * * * shall, from thenceforth, be deemed an organized village under this act, and the county judge shall, thereupon, call, and fix the time and place of an election to elect village officers, and cause notice thereof to be posted or published, and perform all other acts in reference to such election, in like manner, as nearly as may be, as he is required to perform in reference to the election of officers in newly organized cities."

In these sections the term "county judge" is usually used, but in the latter part of section 5 the words "judge of the county court" are found. It will be noted that section 6 provides that the result of the election shall be "entered upon the records of the county court." Section 7 provides that in conducting the election for village officers the county judge shall perform certain acts "in like manner, as nearly as may be, as he is required to perform in reference to the election of officers in newly organized cities." Under article I of this same Cities and Villages act it is provided (section 5) that in organizing cities the petition shall be filed with "the clerk of the county court" and addressed "to the judge of such court," and that the "county judge" shall fix the time and place of the election. Article I also provides that the "county judge" shall call to his assistance two justices to canvass the returns, and that the "county judge" shall call and give notice of the election for the first city officials, the same as the later sections of said article II provide he shall do as to village organization and the election for the first village officials.

A comparison of the provisions of article I with those of article II leads to the conclusion that the legislature

intended that the county judge and county court should perform the same duties in organizing cities under said article 1 that he or it performs in organizing villages under said article 11. To construe this statute so that in organizing cities the petition must be addressed to "the judge of the county court," while in organizing villages it must be addressed to "the county judge," would, in our judgment, be contrary to the intention of the legislature. Many of the acts of the county judge as to the organization of cities or villages are ministerial in character, and not judicial, (*Kamp v. People*, 141 Ill. 9,) as are many duties performed by him under other statutes. (*People v. Evans*, 247 Ill. 547; *People v. Hoffman*, 116 id. 587; *Sherman v. People*, 210 id. 552.) It will be seen from the decisions last referred to, that some duties of the county judge may be ministerial, while others, under the same statute, may be judicial or *quasi*-judicial. It is apparent that some of the acts of the county judge in the organization of cities and villages are judicial in character, as it is required that the statement of the result of the vote on organization shall be "entered upon the records of the county court." This court, in discussing this statute in reference to the organization of villages, in *People v. New*, 214 Ill. 287, said, (p. 291,) that "all orders entered by the county court which were not strictly required by the statute" may be deemed surplusage, plainly inferring that the county court had the power to enter certain legal orders with reference to the organization of villages. The offices of judge of the county court and county judge are held by one and the same person.

We think it is clear from a comparison of said article 1 of the Cities and Village act as to the organization of cities with said article 11 as to the organization of villages, that the terms "county judge" and "judge of the county court" are used interchangeably and synonymously in both

articles. The petition in this case was rightly addressed to the judge of the county court.

It is further urged that section 6 of said article 11 requires that the petition shall be filed with the county clerk, and the filing mark thereon states that it was filed with the clerk of the county court. We are disposed to hold that a fair construction of the provisions of said articles 1 and 11 of the Cities and Villages act, above referred to, requires that the petition shall be addressed to the judge of the county court and be filed with the clerk of the county court, as some of the proceedings in organizing the city or village must be made a part of the records of the county court.

It is further urged by appellee that section 1 of said article 11 provides that the notices shall be posted "in public places in such town for at least fifteen days prior to holding such election," and that the affidavit shown in the amended plea only states that the notices were posted fifteen days before the election when it should have stated that they remained posted during all that time. Statutes must be reasonably construed. To construe this section as argued by appellee would render the compliance therewith practically impossible. To make the necessary proof that the notices remained posted continuously for at least fifteen days before the election in the five public places would require a man on guard at each place of posting, night and day, for fifteen days. Such was not the intention of the legislature.

Under our construction of the statutes the amended plea shows, as to the questions raised by appellee, a legal right and title in appellants to exercise the offices of president, trustees and clerk, respectively, of said village. The judgment of the circuit court is therefore reversed and the cause remanded to that court for further proceedings not in conflict with the views herein expressed.

Reversed and remanded.

JOHN S. WAYMAN *et al.* Appellees, *vs.* GEORGE A. FOLLANSBEE *et al.* Appellants.

Opinion filed February 23, 1912—Rehearing denied April 11, 1912.

1. TRUSTS—*equity has power to terminate trust as to part of beneficiaries.* A court of equity, in a proper case, has power to order a trustee to pay or distribute to such beneficiaries as may be entitled thereto their respective portions of the trust estate and continue the trust as to other beneficiaries who, by reason of their minority or other causes, are not entitled to their share.

2. SAME—*when court of equity may terminate trust as to residuary legatees.* Where the death of the testator's only son has definitely fixed the proportion of the trust estate which is to go to the residuary legatees and has removed the only reason for continuing the trust as to them, a court of equity may terminate the trust as to them notwithstanding the trust must be continued as to the beneficiary of the remaining portion of the estate.

3. SAME—*what is not ground for refusing to terminate trust as to residuary legatees.* The facts that the continuance of the trust may benefit the trustee and possibly increase the income of the sole legatee of one-half the estate, or that as to such legatee the trust must be continued until he reaches the age of twenty-five years, and that a fund must be set aside by the trustee to secure monthly payments to such legatee during the trust and a specific legacy at its termination, do not justify refusing to terminate the trust as to residuary legatees whose interests are fixed and vested and as to whom no reason exists why the trust should be continued.

CARTWRIGHT and DUNN, JJ., dissenting.

APPEAL from the Circuit Court of Cook county; the Hon. LOCKWOOD HONORE, Judge, presiding.

FRED BARTH, FOLLANSBEE, McCONNELL & FOLLANSBEE, and ALBERT M. KALES, for appellant George A. Follansbee.

HERRICK, ALLEN & MARTIN, and FRANK E. HARNESSESS, for L. L. Barth, guardian *ad litem*.

BRICKWOOD & BRICKWOOD, (C. STUART BEATTIE, of counsel,) for appellees.

Mr. JUSTICE VICKERS delivered the opinion of the court :

John S. Wayman and ten other residuary legatees under the last will of Reuble M. Outhet filed a bill in chancery in the circuit court of Cook county against George A. Follansbee, individually and as trustee, and John C. Outhet, Jr., for the purpose of having the will construed and for a partition of the estate in the hands of the trustee, or, in the alternative, that the court direct the trustee to distribute to the complainants their respective shares in said estate and for an accounting of the rents and profits received by the trustee and which are claimed by the complainants. The court below held that the estate should be retained by the trustee until John C. Outhet, Jr., attained the age of twenty-five years, unless he should die before that time, and that the complainants were not entitled to a partition, but granted complainants below relief to the extent of requiring the trustee to account for and pay over to complainants their respective shares of the rents, income and profits of said estate during the continuance of the trust. From this decree certain complainants below, and George A. Follansbee, individually and as trustee, and John C. Outhet, Jr., have prosecuted several appeals to this court, which said appeals have been consolidated in this court and will all be disposed of as one case.

The rights of all the parties are derived from the will of Reuble M. Outhet, who died testate on September 18, 1907. He died seized of an estate consisting of \$30,000 in cash, \$85,000 in other personal property, and real estate estimated at from \$700,000 to \$1,000,000. He was a widower, about seventy years of age at the time of his death. He had only one child, John C. Outhet, who was about thirty-two years of age. John C. Outhet had one son, named John C. Outhet, Jr., by his first wife. John C. Outhet had married a second wife about a year before the will was made, with whom he was living at that time and at the time

of testator's death. The testator left no lineal descendants except his son, John C. Outhet, and his grandson, John C. Outhet, Jr., who was born August 5, 1899. The complainants below and residuary legatees under the will were cousins or relatives of the testator's deceased wife. The complainants below are all adults and are from forty-five to sixty-eight years of age. Omitting certain unimportant portions thereof, the will is as follows:

"First—I give and bequeath unto my son, John C. Outhet, my scholarship in the Northwestern University at Evanston, Illinois, (being the scholarship that was left me by my father's will,) to have and to hold the same as his absolute property forever. I also give and bequeath to him all my household furniture, jewelry, personal adornments and wearing apparel, except my watch and chain, to have and to hold the same as his absolute property forever. I also give and bequeath to him the sum of twenty-five thousand (\$25,000) dollars, the same to be paid to him in cash or its equivalent within ninety days after my decease, as his absolute property forever.

"Fifth—I give, devise and bequeath to my cousin, George A. Follansbee, all the rest, residue and remainder of my property, of every kind, nature and description and wherever situated, to have and hold the same upon the following trusts, that is to say:

"(1) Said property shall be held by him during the lives of my son, John C. Outhet, and my grandson, John C. Outhet, Jr., and the survivor of them, and twenty-one (21) years thereafter, unless such trust is sooner terminated in some one of the manners hereinafter provided.

"(2) My said trustee is hereby authorized and empowered to manage and control said property to as full an extent as he could do if he was the owner thereof. To that end he is hereby authorized and empowered, among other things, to let and re-let the same and each and every part thereof; to make loans upon the said property or any part

thereof, and to secure the same by mortgages or trust deeds; to improve the same and each and every part thereof; to make repairs thereon from time to time, as in his judgment is needed; to re-build the building or buildings thereon, or any part thereof, from time to time, as in his judgment seems desirable, and to pay for the same either out of the funds or property in his hands or out of loans to be made therefor; to keep said property insured in good and responsible insurance companies; to sell and dispose of said property or any part thereof, and to make proper deed or deeds of conveyance therefor; to pay the taxes, assessments and other impositions that may be levied thereon, as they may from time to time accrue, and, in fine, to do whatever in his judgment may seem best to be done during the time that such property shall be held by him under this trust. My said trustee is also hereby authorized and empowered to make ground leases upon any or all of my property for such time and upon such terms and conditions as to him shall seem best. I mean by the term 'ground leases,' leases upon the ground or fee of any property of which I might die seized, for a long term of years, wherein, as a rule, the lessee makes the improvements thereon.

"(3) So long as my son, John C. Outhet, shall live, I direct that out of the net income to arise from my property so held in trust, other than the premises known as Nos. 116-118 Franklin street, Chicago, Illinois, there shall be paid to him monthly, at the end of each and every month, the sum of two hundred and fifty (\$250) dollars. If my said trustee shall be of the opinion that the said sum of two hundred and fifty (\$250) dollars per month is not a sufficient amount to be paid over to him, he is hereby authorized to pay over to him such further sum or sums, monthly, in addition thereto, as he may deem proper, until such time as in his judgment he shall deem it best to again commence paying only the said sum of two hundred and fifty dollars (\$250) per month to him.

"(4) If my son, John C. Outhet, shall attain the age of forty years, I hereby authorize and direct my said trustee to convey to him at that time, as his absolute property forever, the premises known as 116 and 118 Franklin street, Chicago, Illinois; and in the meantime, I hereby authorize and direct him to pay over to the said John C. Outhet, in addition to the sums named in the preceding paragraph, the net income to be derived from said premises, as often as once in three months.

"(5) In addition to the property aforesaid, I hereby authorize and empower my trustee, whenever at any time in his judgment he shall deem it wise or best, to convey and transfer to my said son, John C. Outhet, such other and further property embraced in and covered by this trust as he in his judgment shall deem best, reserving, however, at all times in the trust hereby created a sufficient amount of property to yield a net income ample to pay the yearly allowances hereinafter provided in favor of my grandchild or grandchildren.

"(6) From the time of my decease I direct my said trustee to pay to my grandson, (who was seven years of age on the 5th day of August, 1906,) at the end of each and every month, the sum of seventy-five (\$75) dollars until he shall have attained the age of sixteen years, and thereafter the sum of one hundred (\$100) dollars until he shall have attained the age of twenty-five years. Said payments, however, are to be subject to the discretion of my said trustee, and if for any reason he should deem it best to withhold said allowances, or any part thereof, he is hereby authorized to do so. It is my desire that the said payments and allowances aforesaid shall be used, as far as necessary, in his support and education, and if he shall die before attaining the age of twenty-five years such payments shall cease at his death. None of said payments shall continue after he has attained the age of twenty-five years nor after the termination of this trust, as hereinbefore specified.

If there shall be born to my son, John C. Outhet, in lawful wedlock, a child or children other than the John C. Outhet, Jr., and they or either of them shall survive me, then from the time of my decease I direct my said trustee to pay to each of them, at the end of each and every month, the sum of twenty-five (\$25) dollars for the first five years thereafter; the sum of forty-one dollars and sixty-seven cents (\$41.67) for the second five years thereafter; the sum of fifty-eight dollars and thirty-four cents (\$58.34) for the third five years thereafter; the sum of eighty-three dollars and thirty-four cents (\$83.34) for the fourth five years thereafter; the sum of one hundred (\$100) dollars for the fifth five years thereafter,—said payments, however, to be subject to the discretion of my said trustee, and if for any reason he shall deem it best to withhold said allowances, or any part thereof, he is hereby authorized to do so. It is my desire that the said payments and allowances aforesaid shall be used, as far as necessary, for their respective support and education, and if either of said grandchildren shall die before attaining the age of twenty-five years said payments and allowances shall cease as to such child at his death. None of such payments shall continue to any such grandchild after she or he attains the age of twenty-five years nor after the termination of this trust, as hereinbefore specified.

“(7) If the net income that shall be derived from my estate shall be insufficient to pay the full amount hereinbefore provided for my son and grandchild or grandchildren, then the same shall be abated *pro rata*.

“(8) Should there be a surplus of the net income of my trust estate after the payment of allowances and legacies hereinbefore provided for my son and grandchild or grandchildren, I desire my said trustee to invest the same in securities that will be readily convertible into cash, so that in case any part of my property shall be injured or destroyed, by fire or otherwise, or in case he shall desire to

improve any part thereof, he will be able to obtain the cash therefrom for the purpose of so doing, and thus avoid the necessity of making loans therefor and securing the same as hereinbefore provided.

"(9) Should any grandchild of mine attain the age of twenty-five years, I hereby authorize and direct my said trustee to pay over to such grandchild at that time the sum of twenty-five thousand dollars in cash or its equivalent in real or personal property, to have and to hold the same to him or to her as his or her absolute property forever.

"(10) If my son, John C. Outhet, shall die leaving a child or children born in lawful wedlock him surviving, when the youngest of such children then surviving shall attain the age of twenty-five years, if he does so prior to the termination of this trust first above provided, my said trustee is hereby authorized and directed to close this trust. He is also hereby authorized and directed to close this trust if the last surviving child shall die before attaining the age of twenty-five years and before the termination of this trust as first above provided. In the first case, to-wit, when the youngest of such children then surviving shall attain the age of twenty-five years, he is hereby authorized and empowered, in case my said son shall then have but one child him surviving, to convey and transfer to said child five-tenths part of said trust estate; in case he shall then have two children him surviving, the six-tenths part thereof; in case he shall then have three children him surviving, the seven-tenths part thereof; in case he shall then have four children him surviving, the eight-tenths part thereof; in case he shall then have five children him surviving, the nine-tenths part thereof; in case he shall then have six or more children him surviving, then the whole of the said estate. Should there be more than one child him surviving, each child then surviving shall share and share alike with each of the other children so surviving and to be benefited under the provisions of this trust. If all of said trust estate is

not disposed of as above, then what remains shall be disposed of under the twelfth paragraph of this trust. In the second case above provided for, should no one of such children live to be twenty-five years old and said trust shall not have terminated by lapse of time, as first hereinbefore provided, then said property shall be disposed of under the twelfth paragraph of this trust.

“(11) If my said son, John C. Outhet, shall die and leave a widow surviving, then, within one year after the date thereof, my said trustee shall transfer and set over to her money to the amount of twenty-five thousand (\$25,000) dollars or its equivalent, to be her absolute property forever.

“(12) In case there should be any part of my property left undisposed of under the foregoing provisions of this trust, I direct that as soon as may be after the termination thereof the same shall be converted into money or its equivalent and shall be distributed as follows, to-wit: Six and two-thirds per cent thereof to my cousin Bertha S. Morrell; six and two-thirds per cent to my cousin Fred H. Sherman; six and two-thirds per cent to Gertrude H. Foote, daughter of my cousin John B. Foote; six and two-thirds per cent thereof to my cousin James B. Wayman; six and two-thirds per cent thereof to my cousin William O. Wayman; six and two-thirds per cent thereof to my cousin John E. Wayman; six and two-thirds per cent thereof to my cousin Charles A. G. Wayman; six and two-thirds per cent thereof to my cousin Mary Jane Coleman; six and two-thirds per cent thereof to Ira M. Harries, the brother of my deceased wife; six and two-thirds per cent to Howard H. Harries, the brother of my deceased wife; sixteen and two-thirds per cent thereof to my cousin Ada Root, and sixteen and two-thirds per cent to my cousin George A. Follansbee. If either of my said devisees shall not be living at the time of my decease but shall have died leaving a child or children, then such child of such deceased devisee, or the survivors of them, shall receive such part of my said estate as

such deceased devisee would have received had he or she been living at that time, share and share alike; and if any one of said devisees shall die prior to that time, leaving no child or children, then his heirs-at-law shall receive such part of my estate as such deceased devisee would have received had he or she been living at that time, according to the rule of descent then in force in the State of Illinois. If, however, any one of my said devisees shall during his or her lifetime, either prior or subsequent to the time of my decease, leave a last will and testament, in which he or she shall designate in what manner such testator desires to dispose of any interest he or his heirs would otherwise have had hereunder in my estate, then the interest hereby intended to be devised, as hereinbefore directed, shall go to the person or persons so named in such testator's will, in the proportions therein designated."

Paragraph 13 relates to the appointment of a successor in case of the death of the said George A. Follansbee. Paragraph 14 is as follows:

"(14) I hereby direct that there shall be paid to my said trustee, or his successors in trust, a reasonable compensation for his or their services in connection with the duties to be performed hereunder, the amount to be fixed from time to time by any court having jurisdiction of such matters."

The remaining portions of the will and the codicil have no bearing on the questions at issue in this case. John C. Outhet died on the 7th of June, 1909, at the age of thirty-four, leaving him surviving a widow and one son, John C. Outhet, Jr., who was then not quite ten years of age. The provision of the will for the payment of an annuity to John C. Outhet was complied with until it was suspended by his death, and the payments to the grandson were continued up to the entry of the decree. A number of specific legacies provided for in the first four paragraphs of the will have been paid, and \$25,000 has been paid to the widow

of John C. Outhet under paragraph 11 of the will. The power given to the trustee to convey property of the estate to John C. Outhet, in his discretion, was never exercised and no property was conveyed to him under said power. John C. Outhet having died before he reached the age of forty, he took no interest in the premises known as 116 and 118 Franklin street, Chicago, under paragraph 4 of the will.

Appellees and George A. Follansbee contend that upon the death of John C. Outhet, leaving only one child, they became entitled to five-tenths of the estate, subject to the monthly payments to said John C. Outhet, Jr., and subject also to the contingent legacy of \$25,000 which John C. Outhet, Jr., will become entitled to if he lives to the age of twenty-five years; that by the death of John C. Outhet the rights of appellees and Follansbee to five-tenths of the estate became fixed, and the purposes of the trust as to such five-tenths having been accomplished, their right to the immediate distribution and enjoyment of their respective shares should be recognized by the trustee or otherwise secured to them by the decree of the court. On the other hand, the trustee and John C. Outhet, Jr., contend that it was the intention of the testator to keep his estate intact and continue the trust as to the whole of said estate until it was terminated by John C. Outhet, Jr., attaining the age of twenty-five years, or by his death should he die before that time. Appellants contend that even if the interest of appellees is a vested remainder under the will, the enjoyment thereof is postponed, under a proper construction of the will, until the trust is terminated in the manner above stated, and that such construction of the will does not bring it in conflict with any established rules of law.

A careful study of the will will disclose that the controlling concern of the testator was to make ample provision for his son and grandson and any other grandchildren that might thereafter be born. A brief reference to some of the clauses and paragraphs of the will in which provi-

sions are made for the son and grandchildren will show the interest and solicitude the testator had for his lineal descendants.

By the first clause of the will the son is given a scholarship in the Northwestern University and all of the household furniture, jewelry, personal adornments and wearing apparel, except the testator's watch and chain, and he is also given the sum of \$25,000, to be paid to him in cash or its equivalent within ninety days after the testator's death. By the fifth clause the residue of the property is devised to the trustee, to hold during the lives of the son and the grandson, and the survivor of them, and twenty-one years thereafter, unless the trust is sooner terminated in accordance with the provisions of the will thereafter made. After enumerating the powers that are given to the trustee in the second paragraph of the fifth clause, the mind of the testator again reverts to his son, John, and the trustee is there directed to pay him \$250 a month out of the income of property other than Nos. 116 and 118 Franklin street, and the trustee is given discretion to pay to said son any further sum or sums, monthly, which the trustee may deem proper or necessary, thereby, in effect, placing the entire income of this large estate subject to be appropriated by the trustee to supply the needs of the son. The testator by the next paragraph authorizes and directs the trustee to convey absolutely the premises known as 116 and 118 Franklin street to the son when he attains the age of forty years, and in addition he is given the entire income of said premises, to be paid to him as often as once in three months. By the next paragraph the trustee is authorized to convey and transfer to the son any other and further property embraced in the trust as in the judgment of the trustee he shall deem best, reserving only a sufficient amount of property to yield a net income sufficient to meet the allowances made for the grandchildren by paragraph 6 of the will. Paragraph 6 provides for the payment, monthly, of \$75 to

the grandson until he attains the age of sixteen years, and thereafter \$100 per month until he attains the age of twenty-five years. By said paragraph it is also provided that if there shall be born any other grandchildren who shall survive the testator, the trustee is directed to pay a monthly allowance to each of said grandchildren, increasing the amount at stated periods until it reaches the sum of \$100 per month. Paragraph 9 provides for the payment of \$25,000 in cash to each grandchild upon such child arriving at the age of twenty-five years. By paragraph 10 it is provided that if the son of the testator shall die leaving a child or children, the trustee is directed to close the trust when the youngest of such grandchildren shall reach the age of twenty-five years, provided he does so prior to the termination of the trust; and it is provided in said paragraph that if the son should leave one child, upon his attaining the age of twenty-five the trustee is to convey and transfer to said child five-tenths of the trust estate; if two children are left, six-tenths shall be conveyed to them; if three children are left, seven-tenths, and so on, adding a tenth for each additional child until five are provided for, and then it is provided that if there are six or more children they shall have the whole estate, share and share alike. It is then provided that if all of the trust estate is not disposed of as above, the remainder shall be disposed of under the twelfth paragraph.

It will thus be seen that the primary and controlling purpose of the testator was to make ample provision for his lineal descendants, and to carry out this purpose he provided that in certain contingencies the entire trust estate might be appropriated under the will. If John C. Outhet had died leaving six children surviving him, they would have taken the entire trust estate if the provisions of the will were to be given effect according to the clear intention of the testator. The testator manifestly had two objects in view in creating the trust: He desired to provide for any

grandchildren that might be born after his death, and he wanted to postpone the distribution of his estate to such grandchildren until they should reach the discreet age of twenty-five years. Under the will the estates of appellees vested subject to be opened up to let in the interest of any grandchildren that might thereafter be born. There is nothing in the will that tends to show that the testator had any other purpose in creating the trust and postponing the distribution of his estate. There is no reason personal to appellees why the trust should be created or continued. As already stated, these beneficiaries were adults and *sui juris*, and the youngest one of them was forty-five years of age. Neither can it be maintained with any show of plausible reasoning that this was a trust for accumulation. That suggestion is answered by the several provisions of the will already adverted to, authorizing and directing the distribution not only of the income but also of the corpus of the estate itself, in the discretion of the trustee. Upon the death of the testator one-half of the estate vested, subject to the other legacies and charges made by the will, in appellees and George A. Follansbee individually. Distribution could not be made at that time under the will, since John C. Outhet was then alive and there was the possibility of his having other children who would share in the estate.

We are brought more readily to the conclusion that the estate vested upon the death of the testator, as above stated, subject to be opened up by the birth of other children, by a consideration of the provisions in paragraph 12 of the will for the interests of any of the devisees who might die either before or after the testator, to pass to their children, or their heirs in case no children were left, or to such persons as might be designated by the devisees in any last will and testament which such devisee might leave. Appellees and George A. Follansbee having a vested remainder in five-tenths of the estate, the enjoyment of which was postponed to let in the interests of any after-born grandchild-

dren, when that purpose of the postponement was effected by the death of the testator's only son without leaving any other children, the purposes of the trust, in so far as it applies to this five-tenths interest, were fully accomplished.

When the purpose of a trust is accomplished and there is no time specified for its termination, it will end with the accomplishment of the purpose for which it was created. (*Kohtz v. Eldred*, 208 Ill. 60; *Armstrong v. Barber*, 239 id. 389; *Scars v. Choate*, 146 Mass. 395; 15 N. E. Rep. 786; *Clafin v. Clafin*, 149 id. 22; 20 id. 454; *Soteldo v. Clement*, 11 Ohio Dec. 802; Schouler on Wills, sec. 610.) In *Clafin v. Clafin*, *supra*, the Supreme Court of Massachusetts said: "This court has ordered trust property conveyed by the trustee to the beneficiary when there was a dry trust, or when the purposes of the trust had been accomplished, or when no good reason was shown why the trust should continue and all the persons interested in it were *sui juris* and desired that it be terminated." The same language is found in Schouler on Wills, *supra*. In *Kohtz v. Eldred*, *supra*, on page 72, this court said: "Where the evident purpose of a trust is the accomplishment of a particular object the trust will terminate so soon as that object has been accomplished, and the fact that a fee is given to the trustee does not show the testator's intention that the trust estate shall continue after the active duties connected with the trust have been accomplished,"—citing Page on Wills, sec. 618. In *Armstrong v. Barber*, *supra*, on page 403, it is said: "This court, in *Kohtz v. Eldred*, 208 Ill. 60, has stated that such a trust will terminate as soon as the object for which it was established has been accomplished." In *Scars v. Choate*, *supra*, it is said: "There is no doubt of the power and duty of the court to decree the termination of the trust where all of its objects and purposes have been accomplished, where the interests under it have all vested and where all parties beneficially interested desire its termination. Where property is given to certain

persons for their benefit and in such manner that no other person has or can have any interest in it, they are, in effect, the absolute owners of it, and it is reasonable and just that they should have the control and disposal of it unless some good cause appears to the contrary,"—citing *Smith v. Herrington*, 4 Allen, 566; *Bowditch v. Andrew*, 8 id. 339; *In re Stone*, 138 Mass. 476; *Inches v. Hill*, 106 id. 575; *Underwood v. Bank*, 141 id. 305; 4 N. E. Rep. 822.

Appellants earnestly contend that the case at bar does not fall within the rule above announced. Since, as it is said, the will fixes a definite time when the trust is to be closed, if the court was asked to terminate this trust as to the interest of John C. Outhet, Jr., there would be no answer to appellants' position. It is perfectly plain that one of the purposes of the testator in creating the trust was to provide against the possible mismanagement of the shares of the grandchildren until they attained the age of twenty-five years. While the testator made suitable provision for his grandchildren until they attained the age of twenty-five years, still, for reasons which he deemed sufficient, he expressly provided that their shares should continue in the trust until they reached the required age. But the reasons that led to the fixing of this limitation in regard to the grandchildren have no application when considered in reference to the shares of the adult beneficiaries, who are as capable of managing their interests now as they ever will be.

But it is said that the will provides that the trustee shall, when the trust is terminated, convert the residue of the estate, if any, into money and distribute the same to the residuary legatees according to their respective interests. This argument is based on a mere implication from the language of the will. The will nowhere expressly directs the trustee to do anything in regard to such part of the estate as may pass to appellees under the twelfth paragraph of the will. The language of the will is: "In case there should be any part of my property left undisposed of under

the foregoing provisions of this trust, I direct that as soon as may be after the termination thereof the same shall be converted into money or its equivalent and shall be distributed as follows." The duty to convert the residue of the property into money and distribute the same is not enjoined on the trustee. The direction is simply that "the same shall be converted into money or its equivalent and distributed as follows," but by whom the conversion is to be effected the will is silent. If an argument is to be drawn from this language, it would be a fair inference that the testator contemplated that the conversion and distribution under the twelfth paragraph might be made in some other manner than by the action of the trustee. The entire will bears evidence of having been carefully drawn. The omission in paragraph 12 to direct that the trustee shall convert the residue into money and distribute the same is not without significance. In all other parts of the will where duties are enjoined upon the trustee the language is unambiguous.

But even if it be conceded that it is implied that the trustee shall convert the residue into money or its equivalent and distribute the same to appellees because the title to the property was placed in the trustee by the first paragraph of clause 5 of the will, that fact does not have any bearing upon the question when such conversion and distribution shall take place. As we have seen, upon the death of John C. Outhet there was a complete vesting in the appellees and Follansbee of one-half of this estate, subject only to the payment of the monthly allowances and the contingent legacy of \$25,000. Their title being a vested remainder, has all of the elements incident to absolute ownership in fee. It cannot be doubted that they took such an equitable estate as might be alienated, and which, at least in equity, would be subject to the payment of their debts. (*Sparhawk v. Cloon*, 125 Mass. 263.) After the death of the son leaving but one child, nothing that could thereafter happen would diminish or defeat their title. No reason ex-

ists for the continuance of this trust as to the five-tenths interest of appellees and George A. Follansbee. No one, unless it is the trustee, will be benefited by withholding from appellees the enjoyment of their interests until the grandchild becomes twenty-five years of age.

But it is said by appellants that the trust should be continued as to the whole estate because it will be more beneficial to the minor, in that the estate can be handled more advantageously as a whole and made to yield a greater income than to have it divided at this time. The premises upon which this argument is based may be well questioned. At all events, it would be highly inequitable to wholly deprive appellees of all benefits from the use of their interests until most of them would probably be dead, in order to increase the possible income of the minor's share of the property.

Again, appellants insist that the trust property cannot be divided and the trust terminated as to one part and continued as to the other. There is no doubt of the power of a court of equity to order a trustee to pay or distribute to such beneficiaries as may be entitled thereto, their respective shares of the estate and continue the trust as to other beneficiaries who, by reason of minority or for other cause, are not entitled to their shares. This power has often been exercised by courts of chancery in proper cases. (*Inches' v. Hill, supra*; *Sears v. Choate, supra*; *Matthews v. Thompson*, 186 Mass. 14; *Welch v. Trustee*, 189 id. 108; *Northern Trust Co. v. Wheaton*, 249 Ill. 606.) In *Northern Trust Co. v. Wheaton, supra*, on page 616, this court said: "The foregoing authorities seem to settle the question now under consideration in favor of the acceleration of the remainder of the beneficiaries and to establish their right to the immediate enjoyment of the estate, except as to those, if any, who have not reached their majority. As to such, if any, the trust will be continued until they reach their majority."

Our conclusion upon this branch of the case is, that the court below erred in not granting appellees the full measure of relief to which they were entitled.

The monthly allowances for the benefit of John C. Outhet, Jr., are a charge upon the entire estate, as is also the contingent legacy of \$25,000 payable to him when he arrives at the age of twenty-five. In order to properly take care of these charges the trustee should be required to set aside \$30,000 and invest the same in some safe income-bearing securities and keep the same so invested until the minor reaches the age of twenty-five years, the income from such investment to be applied to the payment of the monthly allowances to the minor, and when he arrives at the age of twenty-five years he should be paid \$25,000.

Counsel on both sides have discussed the application of the rule against perpetuities in its supposed application to the provisions of the will in regard to after-born grandchildren. In the view that we take of the case it is not necessary to consider that question. No one is claiming any interest by virtue of those provisions of the will which are supposed to offend the rule against perpetuities. Whatever view might be taken of those provisions, the will is valid in other respects, and the result is the same regardless of any view that might be taken of that question.

It follows from what has been said that the decree of the court below should be reversed on the cross-errors of appellees, which is accordingly done. The cause will be remanded to the circuit court of Cook county, with directions to that court to enter a decree in accordance with the views herein expressed, directing the trustee to close the trust as to five-tenths of the estate and for a partition among the appellees and George A. Follansbee individually, in accordance with the usual practices of the court in partition proceedings.

Reversed and remanded, with directions.

CARTWRIGHT and DUNN, JJ., dissenting.

JOHN G. KLEINHANS *et al.* Appellees, *vs.* EDWIN KLEINHANS *et al.* Appellants.

Opinion filed February 23, 1912—Rehearing denied April 3, 1912.

1. WILLS—*section 13 of Conveyances act removes necessity for using words of inheritance.* Since the enactment of section 13 of the Conveyances act it has not been necessary to use words of inheritance in order to convey or devise a fee simple estate.

2. SAME—*when devise over will not take effect.* If there is a devise *simpliciter* to one person and in case he should die (which is inevitable) to another, the time of death referred to is before the death of the testator, and if the first devisee survives the testator he takes an estate in fee and the devise over never takes effect; but if the devise over refers to death connected with a contingency which may or may not happen, the time of death referred to is at any time under the conditions named, either before or after the testator's death, and the mere fact that the first devisee survives the testator does not vest the fee simple in him.

3. SAME—*when will creates only a life estate with a contingent remainder.* A devise to the testator's wife for life and after her death to the testator's son and daughter in equal shares, "and in case of their death then to their children, only, and if no children are left by them, then the survivor of my children shall inherit the other's," creates in the son and daughter a life estate after the death of the testator's wife, with remainder to those children of the son and daughter who may survive their parents; and if either life tenant dies leaving no children then the surviving life tenant takes the entire life estate, and the children of such survivor, if any there be, will take the whole estate in fee, but if no children survive either life tenant then the fee becomes intestate estate.

APPEAL from the Superior Court of Cook county; the Hon. THEODORE BRENTANO, Judge, presiding.

EDMUND W. FROELICH, for appellants.

GOLDZIER, RODGERS & FROELICH, for appellees.

Mr. JUSTICE VICKERS delivered the opinion of the court:

This is an appeal from a decree of the superior court of Cook county construing the last will and testament of Jacob Kleinhans, deceased. Jacob Kleinhans died Janu-

ary 18, 1878, leaving a widow, Anna Maria Kleinhans, and two children, Johann G. Kleinhans and Anna M. Greifenhagen, him surviving. The two children of the testator are both living and each of them has children, who are appellants in this cause. The will of the testator provides in the first clause for the payment of all just debts and funeral expenses, and in the second clause the real estate of the testator is devised to his wife during her natural life. The third clause gives the wife all the personal property, of every kind and character. The fourth clause provides that the wife shall not sell or dispose of, by will, any of the real or personal property devised to her, and directs that certain income derived from loans made by the testator shall be used to give his son, Johann Georg Friedrich, a high school education and for the support of the children until they arrive at their majority. By the fifth clause the daughter, Anna Maria, is given \$300, to be paid when she arrives at the age of eighteen years. The sixth clause is the one that is in question in this litigation, and is as follows: "After the death of my said beloved wife, Anna Maria, I give, bequeath and devise the rest, residue and remainder of my estate, real and personal, to my two children,—to my son, Johann Georg Friedrich, and to my daughter, Anna Maria Friedricke,—share and share alike, and in case of their death, then to their children, only, and if no children are left by them, then the survivor of my said children shall inherit the other's." The superior court held that under the sixth clause the son and daughter took an estate in fee and rendered a decree accordingly, to reverse which the grandchildren of the testator have prosecuted an appeal to this court.

The bill in this case avers, and the answer admits, that after the son and daughter attained their majority they executed quit-claim deeds to the widow, and it is admitted that the widow died intestate, leaving as her only heirs-at-law her son, Johann Georg Kleinhans, and Anna M., who

had married one Greifenhagen. The son and daughter of the testator claim the real estate in fee by descent from their mother. Whether this claim is well founded depends upon the construction to be given to the sixth clause of the testator's will. The first sentence of said clause, standing alone, would clearly pass a fee simple title to the son and daughter. That sentence reads as follows: "I give, bequeath and devise the rest, residue and remainder of my estate, real and personal, to my two children,—to my son, Johann Georg Friedrich, and to my daughter, Anna Maria Friedricke,—share and share alike." Since the enactment of section 13 of our Conveyance act it is not necessary that words of inheritance should be used in order to convey a fee simple estate. *Smith v. Kimbell*, 153 Ill. 368; *Metzen v. Schott*, 202 id. 275; *Hill v. Gianelli*, 221 id. 286.

Appellees insist, and the court below held, that the latter portion of clause 6 does not cut the fee simple estate down to a life estate in the primary devisees. The latter part of said clause, which appellants contend modifies the preceding clause, is as follows: "And in case of their death, then to their children, only, and if no children are left by them, then the survivor of my said children shall inherit the other's." We are unable to agree with the chancellor who tried this cause that the latter part of clause 6 has no effect upon the meaning to be given to the entire clause. The testator clearly intended to devise his estate in such way that his widow and his two children, and any grandchildren that he might thereafter have, would enjoy the benefit of his property to the exclusion of all other persons. He first provides for his widow by giving her a life estate in all of his property, both real and personal. He then provides that after the death of his wife his son and daughter should have the estate, share and share alike, and in case of their death, then to their children, only, and if no children are left by them, the survivor would take the entire life estate.

There is a well recognized distinction between a devise *simpliciter* to one person and in case he should die (which is inevitable) to another, and a devise over coupled with a contingency, such as die under age or unmarried, which may or may not happen. In the former case it is held that the time of death referred to is before the death of the testator, and under such a clause, if the primary devisee survives the testator he will take an estate in fee and the devise over will never take effect. (*Fifer v. Allen*, 228 Ill. 507.) But this rule has no application to a devise over which is connected with a contingency which may or may not happen. (*Fifer v. Allen*, *supra*.) In such case the time of death referred to is death at any time under the conditions named, either before or after the death of the testator. Under the clause of the will before us it is clear that the testator intended that his son and daughter should have a life estate, only, and the devise over of a remainder in fee was to such of their children as might be living at the time of the death of their parents, and in case either of said children of the testator died without leaving any child or children surviving them, then the survivor of the two children should take the entire life estate. The words, "in case of their death, *then* to their children, only," mean that the remainder to the grandchildren is contingent upon their surviving their parents. The word "then" in this connection is an adverb of time, and means "at that time." (*Strain v. Sweeny*, 163 Ill. 603.) This conclusion is further borne out by the next clause of the sentence, "and if no children are left by them."

This case is to be distinguished from cases where the expression "die without issue," and the like, is used, which is held to mean death without having had issue. Here only the children "left" at the death of the primary devisees can take, which is equivalent to saying, "such of their children as survive their parents shall take." The remainder, therefore, to the appellants is contingent and depends upon their

surviving their parents. While both of the appellees now have living children it is not impossible that the children may die before their parents, in which event the surviving brother or sister would take the share of the one dying without leaving children surviving.

In *Smith v. Kimbell*, *supra*, the will devised certain real estate to the testator's daughter, Sarah Jane Spears, and provided, "and should the said Sarah Jane Spears die leaving no heirs, I will and direct that all of the above described property shall be equally divided between my sisters," (naming them.) It was held that the word "heirs" in the clause quoted meant "children," and that the clause should be construed as though it read, "should the said Sarah Jane Spears die leaving no children at the time of her death." It was held in that case that the devise to Sarah Jane Spears was a base or determinable fee, subject to be divested upon her dying without leaving children at the time of her death. But the language of the will in the case before us cannot be construed as creating a base fee, for in no contingency does the estate of the testator's two children ever become anything more than a life estate in them. If either of them dies leaving children the estate vests in such children, and in case either should die leaving no children the life estate vests in the survivor, and upon the death of such surviving devisee, leaving children, such children would take the whole estate in fee. If both of the testator's children die leaving no child or children, the fee is not disposed of and would become intestate property.

It follows from what we have said that the court below erred in holding that the two children of the testator took a fee simple title under the sixth clause of the will.

The decree of the superior court of Cook county is reversed and the cause remanded, with directions to enter a decree in conformity with the views herein expressed.

Reversed and remanded, with directions.

THE PEOPLE *ex rel.* A. B. Chilcoat *et al.* Plaintiffs in Error, *vs.* CARTER H. HARRISON, Mayor, *et al.* Defendants in Error.

Opinion filed February 23, 1912—Rehearing denied April 4, 1912.

1. RES JUDICATA—all members of public are represented where real party in interest is the People. Where no private rights are involved the right to maintain a bill to enjoin a public nuisance is in the public, acting through the Attorney General or State's attorney, and in such a proceeding all individuals constituting the public are regarded as represented and will be bound by the decree.

2. SAME—when difference in relators does not make a difference in parties. The fact that citizens who are the relators in a *mandamus* proceeding to compel city officials to remove an alleged obstruction in a street are not the same citizens who were relators in a prior chancery proceeding to enjoin the continuance of the same obstruction does not constitute such a difference in parties as affects the binding force of the former decree.

3. SAME—fact that former proceeding was in chancery while later proceeding is at law is not material. A final decree on the merits in chancery is as conclusive as a judgment at law, and is available as a former adjudication whether the subsequent suit is at law or in chancery.

4. SAME—the doctrine of former adjudication is not limited to questions actually decided. The doctrine of former adjudication is not limited to questions actually decided, but extends to all grounds of recovery or defense which then existed and might have been presented and adjudicated.

5. SAME—decree on the merits, upon demurrer, is available as an adjudication. While a judgment or decree upon demurrer for a defective pleading is not a bar to a subsequent suit in which the cause of action is well pleaded, yet if the decision is upon the merits of a cause of action or defense it will bar a subsequent suit on the same facts, even though it was rendered on a general demurrer.

6. SAME—correct practice where answer does not correctly set out the former proceeding relied upon. If the answer to a *mandamus* petition erroneously describes the proceeding relied upon as a former adjudication as having been a bill in equity the petitioner should plead and not demur to the answer, as a court of review, on demurrer, will look only to the allegation of the answer to determine the character of the former proceeding.

7. SAME—when former decree is a bar to subsequent *mandamus* suit. A decree dismissing on the merits, upon general demurrer, a bill by the State's attorney in the name of the People, on the relation of certain citizens, to enjoin the continuance of an alleged obstruction in the street, is a bar to a subsequent *mandamus* suit against the same defendants by the People, on the relation of other citizens, upon substantially the same facts, to compel the removal of the same obstruction.

WRIT OF ERROR to the Superior Court of Cook county;
the Hon. WILLIAM H. MCSURELY, Judge, presiding.

A. B. CHILCOAT, for plaintiffs in error.

WILLIAM H. SEXTON, Corporation Counsel, and MATTHEW P. BRADY, for defendants in error.

Mr. JUSTICE DUNN delivered the opinion of the court:

This was a petition filed in the superior court of Cook county against the city of Chicago, its mayor and council, for a writ of *mandamus* commanding them to remove certain obstructions alleged to have been unlawfully placed in South Troy street, and certain alleys leading out of it, in the city of Chicago. The Servite Fathers of West Chicago, a religious corporation organized under the laws of this State, subsequently became a defendant. The subject matter of the proceeding is the same as that involved in the case of *People v. Busse*, 247 Ill. 333, and a sufficiently full statement of the allegations of the petition is contained in the opinion in that case. The present petition has remedied the defect specially pointed out there and contains additional and more detailed allegations, but they do not vary the case materially, and it will be assumed that the petition states a case legally sufficient to entitle the petitioners to the relief sought. The basis of the petitioners' claim for relief was, that the ordinance vacating the portions of the street and alleys upon which the obstructions had been placed was illegally passed at the instance of the Servite

Fathers, with the unlawful object of giving to that corporation title to such portions of the street and alleys for educational and religious purposes, and of diverting such portions of the street and alleys to another and different use from that for which they were dedicated, and of giving to the Servite Fathers private rights and benefits in the street and alleys not conferred upon the general public. Separate, identical answers, called in the record pleas, were filed by the Servite Fathers and the city, to which the petitioners demurred. The demurrers were overruled. The petitioners electing to stand by them, the court dismissed their petition, and they sued out a writ of error.

The answers relied upon a former adjudication of the controversy, and alleged that prior to the filing of the petition the People of the State of Illinois, by the State's attorney of Cook county, on the relation of Joseph H. Greer, a citizen and elector of the city of Chicago, in his own behalf as well as on behalf of the general public, filed a bill in equity in the circuit court of Cook county against these same defendants, alleging the same facts as are set forth in the petition concerning the street and alleys, the ordinance vacating them, the acts, objects and motives of the parties and the circumstances of the whole transaction, and praying that the ordinance be adjudged illegal and void; that the defendants be required to remove the obstructions; that the street and alleys be thrown open to the use of the public, and that the defendants be enjoined from maintaining any fence or enclosure on the street or alleys or any part of them, or from making any private use of them. The defendants demurred to this bill, their demurrers were sustained, and, the complainant electing to stand by the bill, the court dismissed it for want of equity. This decree was affirmed by the Appellate Court. *People v. City of Chicago*, 154 Ill. App. 578.

Counsel for the plaintiffs in error states that the question before this court is, do the facts stated in the petition

entitle the petitioners to the relief sought? Most of his argument is devoted to that question, though the defendants in error have not argued it. The demurrer was not carried back to the petition but was overruled to the answer, and no objection has been raised to the petition either here or in the circuit court, the only question considered on the hearing of the demurrer being the sufficiency of the answer as showing a former adjudication. In the view we take of this latter question it is not necessary to consider the former, but, assuming that the petition is sufficient, we shall consider the sufficiency of the answer.

The defendants to the bill were the same as the defendants here, the same facts were alleged and the same relief was sought. The fact that the proceeding was in chancery while the present is a proceeding at law is immaterial, for a final decree in chancery is as conclusive as a judgment at law, and is available as a former adjudication whether the subsequent action is at law or in equity. (Freeman on Judgments, 248; *People v. Rickert*, 159 Ill. 496; *Stickney v. Goudy*, 132 id. 213; *Moore v. Williams*, id. 589; *Town of Lyons v. Cooledge*, 89 id. 529.) Nor is it material that other or additional reasons or arguments are now brought forward for granting the relief sought. The doctrine of former adjudication extends not only to the questions actually decided, but to all grounds of recovery or defense which might have been presented. *Godschalck v. Weber*, 247 Ill. 269.

The bill was filed in the name of the People by the State's attorney, on the relation of Joseph H. Greer, while the petition in the present case was filed in the name of the People on the relation of several petitioners, not including Joseph H. Greer. In both cases the real party in interest is the People. It is only by the people that either suit can be maintained. The right sought to be enforced is a public right. The bill did not allege the relator to be the owner of the fee in the street or to have any special interest. In

such case an individual cannot maintain a bill to enjoin a public nuisance, but the right to do so is in the public, acting through the Attorney General, the State's attorney or the city. (*Hill v. St. Louis and Northeastern Railway Co.* 243 Ill. 344.) "When the object is the enforcement of a public right the people are regarded as the real party and the relator need not show that he has any legal interest in the result. It is enough that he is interested, as a citizen, in having the laws executed and the right in question enforced." (*County of Pike v. People*, 11 Ill. 202.) This petition was filed by the relators merely as citizens and electors, representing the general public, in behalf of the same class for whose benefit the bill was filed. The bill was filed in the name of the People by the officer charged with the duty of instituting proceedings to restrain and abate public nuisances and purprestures, and all the individuals constituting the public are bound by the decree.

It is argued that the decree, having been rendered upon a general demurrer to the bill, is not a bar to a subsequent action between the same parties for the same cause of action. It is true that a judgment, to be a bar, must have been rendered upon the merits. A judgment that a declaration is bad is not a bar to a declaration stating facts which do constitute a cause of action. It is, however, settled law that it makes no difference whether the facts upon which the court proceeded were proved by evidence upon issue joined or were admitted by way of demurrer to a pleading stating the facts. In either case the judgment rendered is equally available as an adjudication, and the facts so established cannot be again drawn in question between the same parties. A judgment upon a demurrer for defect in the pleadings will not bar another action for the same cause, but a decision upon the merits of a cause of action or defense upon demurrer will be a bar in a subsequent proceeding upon the same facts. *Vanlandingham v. Ryan*, 17 Ill. 25; *Marie Church v. Trinity Church*, (*ante*,

p. 21;) *Wilson v. Ray*, 24 Ind. 156; *Gray v. Gray*, 34 Ga. 499; *Perkins v. Moore*, 16 Ala. 17; *Robinson v. Howard*, 5 Cal. 428; *Bouchand v. Dias*, 3 Den. 238; *Bissell v. Spring Valley Township*, 124 U. S. 225.

It is stated in the brief for the plaintiffs in error that the former proceeding was an information in the nature of a *quo warranto*, was defective because not running in the mode required by law and the constitution, was therefore fatally defective, the general demurrers were therefore properly sustained and the decree was not on the merits. Nothing in the record bears this out. We look only to the plea, which says a bill in chancery was filed. If this was not the fact, the proper course for plaintiffs in error was, not to demur but to plead. No defect in the bill which has been corrected by the petition is suggested. The allegations are practically the same and the causes of action are the same. There is no substantial difference in the facts. The decree was on the merits, and was an adjudication that the complainant was not entitled to maintain the cause of action now sought to be maintained. That adjudication concludes the petitioners' rights.

Judgment affirmed.

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